

Merit System Protection Board Annual Report FY2011

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Bruce Ervin Wood, *Vice Chair*
Rodella E. Berry, *Associate Member*

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FY2011
ANNUAL REPORT OF THE
MONTGOMERY COUNTY
MERIT SYSTEM PROTECTION BOARD

COMPOSITION OF THE MERIT SYSTEM PROTECTION BOARD

The Merit System Protection Board (Board) is composed of three members who are appointed by the County Council, pursuant to Article 4, Section 403 of the Charter of Montgomery County, Maryland. Board members must be County residents and may not be employed by the County in any other capacity. One member is appointed each year to serve a term of three years.

The Board members in 2011 were:

Charla Lambertsen - Chairperson
Bruce Ervin Wood - Vice Chair
Rodella E. Berry - Associate Member

DUTIES AND RESPONSIBILITIES OF THE MERIT SYSTEM PROTECTION BOARD

The duties of the Merit System Protection Board are contained in: 1) Article 4, *Merit System and Conflicts of Interest*, Section 404, Duties of the Merit System Protection Board, of the Charter of Montgomery County; 2) Chapter 33, Article II, *Merit System*, of the Montgomery County Code; and 3) Section 35, Merit System Protection Board Appeals, Hearings, and Investigations, of the Montgomery County Personnel Regulations, 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, and July 27, 2010).

1. Section 404 of the Charter establishes the following duties for the Board:

Any employee under the merit system who is removed, demoted or suspended shall have, as a matter of right, an opportunity for a hearing before the Merit System Protection Board, which may assign the matter to a hearing examiner to conduct a hearing and provide the Board with a report and recommendations. The charges against the employee shall be stated in writing, in such form as the Board shall require. If the Board assigns the matter to a hearing examiner, any party to the proceeding shall have, as a matter of right, an opportunity to present an oral argument on the record before the Board prior to a final decision. The Board shall establish procedures consistent with law for the conduct of its hearings. The decisions of the Board in such appeals shall not be subject to review except by a court of competent jurisdiction. The Council shall provide by law for the investigation and resolution of formal grievances filed under the merit system and any

additional duties or responsibilities of the Board. The Board shall conduct on a periodic basis special studies and audits of the administration of the merit and retirement pay systems and file written reports of its findings and recommendations with the Executive and the Council. The Board shall comment on any proposed changes in the merit system law or regulations in a timely manner as provided by law.

2. Section 33-7 of the Montgomery County Code defines the Merit System Protection Board's responsibilities as follows:

(a) *Generally.* In performing its functions, the [B]oard is expected to protect the merit system and to protect employee and applicant rights guaranteed under the merit system, including protection against arbitrary and capricious recruitment and supervisory actions, support for recruitment and supervisory actions demonstrated by the facts to be proper, and to approach these matters without any bias or predilection to either supervisors or subordinates. The remedial and enforcement powers of the [B]oard granted herein shall be fully exercised by the [B]oard as needed to rectify personnel actions found to be improper. The [B]oard shall comment on any proposed changes in the merit system law or regulations, at or before the public hearing thereon. The [B]oard, subject to the appropriation process, shall be responsible for establishing its staffing requirements necessary to properly implement its duties and to define the duties of such staff.

...

(c) *Classification standards.* . . .The [B]oard shall conduct or authorize periodic audits of classification assignments made by the [C]hief [A]dministrative [O]fficer and of the general structure and internal consistency of the classification plan, and shall submit audit findings and recommendations to the [C]ounty [E]xecutive and [C]ounty [C]ouncil.

(d) *Personnel regulation review.* The [M]erit [S]ystem [P]rotection [B]oard shall meet and confer with the [C]hief [A]dministrative [O]fficer and employees and their organizations from time to time to review the need to amend these regulations.

(e) *Adjudication.* The [B]oard shall hear and decide disciplinary appeals or grievances upon the request of a merit system employee who has been removed, demoted or suspended and in such other cases as required herein.

(f) *Retirement.* The [B]oard may from time to time prepare and recommend to the [C]ouncil modifications to the [C]ounty's system of retirement pay.

(g) *Personnel management oversight.* The [B]oard shall review and study

the administration of the County classification and retirement plans and other aspects of the merit system and transmit to the [C]hief [A]dministrative [O]fficer, [C]ounty [E]xecutive and the [C]ounty [C]ouncil its findings and recommendations. The [B]oard shall conduct such special studies and audits on any matter relating to personnel as may be periodically requested by the [C]ounty [C]ouncil. All [C]ounty agencies, departments and offices and [C]ounty employees and organizations thereof shall cooperate with the [B]oard and have adequate notice and an opportunity to participate in any such review initiated under this section.

(h) *Publication.* Consistent with the requirements of the Freedom of Information Act, confidentiality and other provisions of law, the [B]oard shall publish, at least annually, abstracts of its decisions, rulings, opinions and interpretations, and maintain a permanent record of its decisions.

(i) *Public forum.* The [B]oard shall convene at least annually a public forum on personnel management in the [C]ounty [G]overnment to examine the implementation of [C]harter requirements and the merit system law.

3. Section 35-20 of the Montgomery County Personnel Regulations states:

(a) The MSPB has the responsibility and authority to conduct audits, investigations or inquiries to assure that the administration of the merit system complies with County law and these Regulations.

(b) County employees must not be expected or required to obey instructions that involve an illegal or improper action and may not be penalized for disclosure of such actions. County employees are expected and authorized to report instances of alleged illegal or improper actions to the individual responsible for appropriate corrective action, or report the matter to:

(1) the MSPB, if the individual involved in the alleged illegal or improper action is a merit system employee; or

(2) the Ethics Commission, if the individual involved in the alleged illegal or improper action is not a merit system employee or is an appointed or elected official or a volunteer.

APPEALS PROCESS **DISCIPLINARY ACTIONS**

The Montgomery County Charter provides, as a matter of right, an opportunity for a hearing before the Board for any merit system employee who has been removed, demoted or suspended. To initiate the appeal process, Section 35-4 of the Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, July 27, 2010 and February 8, 2011) requires that an employee file a simple notice of intent to appeal a removal, demotion or suspension. In accordance with MCPR Section 35-3, the employee must file the notice of intent to appeal within ten (10) working days after the employee has received a notice of disciplinary action involving a demotion, suspension or removal. Once the notice of intent to appeal has been filed, the Board's staff provides the Appellant with an Appeal Form to be completed within 10 working days.

In accordance with Chapter 21-7 of the Montgomery County Code, a volunteer firefighter or rescuer aggrieved by an adverse final action of the Fire Chief or a local fire and rescue department involving any disciplinary action applied specifically to that individual, including a restriction or prohibition from participating in fire and rescue activities, may appeal the action to the Board within thirty (30) days after receiving a final notice of disciplinary action unless another law or regulation requires that an appeal be filed sooner.

After receipt of the Appeal Form, the Board sends a notice to the parties, requiring each side to submit a list of proposed witnesses and exhibits for the hearing. The Board schedules a Prehearing Conference at which the parties' lists of witnesses and exhibits are discussed. Upon completion of the Prehearing Conference, a formal hearing date is agreed upon by all parties. After the hearing, the Board prepares and issues a written decision on the appeal.

The following disciplinary cases were decided by the Board during fiscal year 2011.

TERMINATION

CASE NO. 10-19

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of the Montgomery County, Maryland, Department of Transportation's (DOT's) Director to terminate Appellant.

FINDINGS OF FACT

Appellant began work for the County as an Equipment Operator on January 26, 2004 with the Department of Public Works and Transportation (DPWT). Appellant took a voluntary downgrade to the position of an Administrative Aide in the DPWT, in March 2007.¹ Hearing Transcript (H.T.) at 24. On July 1, 2008, DPWT was abolished, with its functions being assigned to either the newly created Department of Transportation (DOT) or the newly created Department of General Services. Appellant was transferred to DOT.

Appellant's immediate supervisor in DOT was Manager A. In December 2008, Manager A spoke to the Administrative Specialist about Appellant's attendance, as the Administrative Specialist handles all personnel matters for DOT. H.T. at 22. Based on the Administrative Specialist's discussion with Manager A, the Administrative Specialist began tracking Appellant's leave usage by pay period for 2009. *Id.* at 24, 27; County Exhibit (C. Ex.) 6.

While Appellant had many absences during the summer of 2009, Appellant's absences became continuous beginning on August 31, 2009.² H.T. at 27. On September 29, 2009, Manager A wrote to Appellant, informing Appellant that Appellant's absences caused by Appellant's medical condition qualified for coverage under the Family Medical Leave Act (FMLA) and would be recorded as FMLA absences. C. Ex. 11. Manager A asked that Appellant complete the enclosed FMLA Medical Certification Form³ and provided Appellant with a FMLA Leave informational booklet. *Id.* On October 2, 2009, Manager A again wrote

¹ Appellant first went to this position on light duty. H.T. at 24. The County stipulated that in 2006 and 2007, when Appellant was in the DPWT, Appellant received five annual leave awards for performance and service and two letters of commendation for service. *Id.* at 5-6.

² The County stipulated that Appellant had a medical condition which was the cause of most of Appellant's absences in 2009 and 2010. H.T. at 6.

³ Manager A noted that this request was in accordance with Article 45 of the negotiated agreement between the Municipal and County Government Employees Organization (MCGEO), Local 1994 and the County.

Appellant, asking Appellant for a list of upcoming doctors' appointments. C. Ex. 9. Manager A also reminded Appellant of the need to have Appellant's physician fill out the FMLA Certification Form. Id.

In the fall of 2009, the County began the process of consolidating Department call centers into the newly established MC311 Customer Service Center. H.T. at 53-54. Each Department was expected to provide MC311 with staff and positions from the Department identified with the function of answering calls from the public. Id. at 53. DOT actually had several positions that performed call center functions, but only two were scheduled to transfer to MC311. Id. While most County employees were given no choice with regard to the transfer, because Appellant was the most senior of the individuals performing call center functions for DOT, Appellant was given the opportunity to volunteer to transfer. Id. at 53-54. When Appellant's supervisor asked Appellant about transferring, Appellant indicated Appellant wanted more information, and so it was arranged that Appellant would speak with Manager B, the manager for MC311. Id. at 54. Manager B was aware that Appellant had some absence and tardiness issues and clearly laid out for Appellant what the job would be like, including the fact that regular attendance was critical. Id. at 54-55. Appellant indicated to Manager B that Appellant was excited about the opportunity, and agreed to be transferred.⁴ Id. at 56.

On November 10, 2009, the Administrative Specialist wrote Appellant regarding Appellant's FMLA leave. The Administrative Specialist indicated that Appellant had sent back a completed FMLA Certification Form which covered the period August 27, 2009 through September 30, 2009. C. Ex. 7. However, as Appellant's absences continued after September 30, 2009, Appellant needed to submit a new FMLA Certification Form to continue to be eligible for FMLA leave.⁵

On November 23, 2009, Appellant reported to MC311. H.T. at 56. This was the first day of the mandatory nine-day training class all employees needed to take and complete in order to work in MC311. Id. at 57. The class consists of training on the customer relationship management system, which needs to be mastered in order to work in the call center. Id. at 57-58. While Appellant attended the first day of class, Appellant was absent for the rest of November and December due to Appellant's medical condition.⁶ Id. at 60-61. Manager B recalled having a conversation with Appellant in mid-December during which Manager B told Appellant that MC311 had another training class beginning January 19, 2010, and Manager B would save a spot for Appellant in that class. Id. at 61. Manager B stressed to Appellant that Appellant had to successfully complete the training course or there

⁴ Technically, Appellant was actually detailed to MC311, as no transfers took place until July 1, 2010. H.T. at 30-31, 63, 66. Thus, Appellant remained an employee in DOT. Id. at 31, 33.

⁵ The Administrative Specialist noted that this request was in accordance with Article 45 of the negotiated agreement between MCGEO and the County.

⁶ Manager B noted that, during this time while Appellant was absent, Appellant called regularly to leave messages regarding Appellant's status. H.T. at 60.

would be no job at MC311 for Appellant. Id. at 63.

Appellant returned to work on January 4, 2010. H.T. at 61. As Appellant was not yet trained, Manager B found some work for Appellant to do. Id. at 62. After January 6, 2010, Appellant did not return to work until January 19, 2010, which was the first day of the training class. Id. at 65. As Appellant had previously attended the first day of the training course, Manager B did not have Appellant go to class. Id. After the first day of the class, Appellant was absent until February 1, when Appellant returned to work. Id. at 66. Appellant worked sporadically in February. Id. at 67.

Another training course was scheduled for March 8, 2010. H.T. at 70. Appellant was absent on March 8 and did not return to work until March 16. Id. at 71. Although the training course was still going on, Appellant did not attend the training, as it is cumulative training so that a student needs to be there from the beginning of the course. Id. at 66, 71.

Appellant was issued a Notice of Intent to Terminate on March 18, 2010. C. Ex. 3. The Notice was issued by the Director of DOT, as Appellant was still an employee of DOT. H.T. at 98. Appellant, along with Appellant's union representative, subsequently held a meeting with the Supervisor, Appellant's DOT supervisor, and Manager B. Id. at 72. Subsequently, the union responded in writing on behalf of Appellant to the Notice of Intent. Id. at 73. On April 15, 2010, Appellant received a Notice of Termination, terminating Appellant pursuant to Article 26 of the MCGEO Collective Bargaining Agreement (CBA), effective April 22, 2010. C. Ex. 1.

This appeal followed.

APPLICABLE CONTRACTUAL PROVISIONS

Agreement between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, AFL-CIO and Montgomery County Government, Montgomery County, Maryland, For the Years July 1, 2007 through June 30, 2010, Article 26, Termination, which states in applicable part:

26.1 Definition

Termination is a nondisciplinary act by management to conclude an employee's service with the County. Reasons for termination include, but are not necessarily limited to the following:

- (b) excessive absences caused by ongoing medical or personal problems that are not resolved within 3 calendar months after the date the employee exhausts all paid leave, including any grants of leave received from the sick leave bank.

26.2 Management Responsibility

- (a) Prior to terminating an employee for the reasons stated in (b) above, management must inform the employee in writing of the problem, counsel the employee as to what corrective action to take; and allow the employee adequate time to improve or correct performance or attendance.

POSITIONS OF THE PARTIES

County:

- Appellant was counseled repeatedly by Appellant's supervisor about Appellant's attendance when Appellant was in the Administrative Aide position.
- Appellant did not work a single 80-hour period in all of 2009.
- Appellant's absences became continuous beginning August 30, 2009.
- Appellant was informed by Manager B of how important attendance and being on time were for the position in MC311.
- Manager B spoke with Appellant on at least on two occasions after Appellant agreed to transfer to MC311 about how Appellant could not work in MC311 unless Appellant completed the mandatory training class. Absent the training, Appellant could not do any meaningful work in MC311.
- The record of evidence shows that on September 29, October 2 and November 10, 2009, Appellant received letters about Appellant's absences, FMLA leave and Appellant's sick and annual leave balances.
- The County adequately complied with Article 26 of the MCGEO Collective Bargaining Agreement.

Appellant:

- Appellant worked diligently as an employee and the County has stipulated that Appellant was a good worker in 2006 and 2007, up to the time Appellant began having significant chronic health problems.
- The County has produced no documentary evidence supporting its claim that Appellant exhausted all of Appellant's paid leave.⁷
- The County's attempts at counseling Appellant fell short of what is required under Article 26.
- The County has failed to show that it made any attempts to accommodate Appellant's medical condition.

⁷ While Appellant received a letter from the Administrative Specialist in November 2009, alleging Appellant had exhausted all of Appellant's paid leave, C. Ex. 7, the County never offered into evidence any documentary proof (e.g., Appellant's Pay Advices) of this allegation. H.T. at 35-37.

ISSUE

Whether Appellant's termination is in compliance with Article 26 of the MCGEO Collective Bargaining Agreement?

ANALYSIS AND CONCLUSIONS

The County Failed To Provide Appellant With The Due Process Rights Guaranteed Appellant Under Article 26.

Article 26 of the MCGEO CBA permits the County to effect a nondisciplinary termination when an employee has had excessive absences caused by ongoing medical problems that are not resolved within three calendar months after the date the employee exhausts all paid leave. MCGEO CBA, Section 26.1. However, prior to terminating an employee for excessive absences, the County is required to inform the employee in writing of the problem, counsel the employee as to what corrective action to take, and provide the employee with adequate time to improve the employee's attendance. MCGEO CBA, Section 26.2.

In the instant case, the County has introduced into evidence three documents written to Appellant by DOT personnel. The first document, a letter dated September 29, 2009, from Manager A, informed Appellant of Appellant's right to take FMLA leave and the need to submit an FMLA Certification Form. C. Ex. 11. Nowhere in this letter is Appellant informed that Appellant's absences are a problem, much less is Appellant counseled with regard to what corrective action Appellant needs to take.

The second document is another letter, dated October 2, 2009, from Manager A to Appellant. In this letter, Manager A requests a list of doctors' appointments from Appellant. C. Ex. 9. Manager A also reminds Appellant that Appellant needs to send in the FMLA Certification Form before Appellant's absences are covered under FMLA. Id. Finally, Manager A notes that several dozen personal packages have arrived at the work site for Appellant and counsels Appellant not to have packages delivered to the office. Id.

The last letter sent to Appellant is dated November 10, 2009 and is from the Administrative Specialist. C. Ex. 7. The letter notes that Appellant has been out sick for over 10 weeks and that Appellant's absences have continued to be considered FMLA. Id. The letter requests that Appellant send in a new FMLA Certification Form, as the one Appellant previously submitted only covered Appellant's absences up until September 30, 2009. Id. The letter notes that it is assumed that Appellant continues to have a serious health condition that prevents Appellant from working. Id. The letter advises Appellant that Appellant is out of leave and has been put in a Leave Without Pay (LWOP) status. Id. Because of the LWOP status, Appellant is advised that Appellant does not have sufficient earnings to allow a deduction for Appellant's health and life insurance benefits but will retain the benefits for the entire period under LWOP for FMLA reasons. Id. Upon Appellant's return to work, Appellant is advised that Appellant will have to repay the County for Appellant's share of the cost of insurance that was unpaid during the period of LWOP. Id.

Nowhere in the letter is Appellant counseled that Appellant's absences are a problem or that any corrective action needs to be taken because of Appellant's absences.

The Administrative Specialist testified during the hearing that the Administrative Specialist couldn't remember if the Administrative Specialist ever counseled Appellant about Appellant's absences. H.T. at 40-42. The County submitted no written documentation demonstrating that the Administrative Specialist ever complied with the requirements of Article 26.2.⁸

Manager B testified that Manager B repeatedly told Appellant that attendance was critical to the successful performance of the job in MC311. H.T. at 55, 63. However, Manager B acknowledged that Manager B did not remember putting anything in writing to Appellant that Appellant's absences were problematic. *Id.* at 92. Again, the County submitted no written documentation demonstrating that Manager B ever complied with the requirements of Article 26.2.

The Director of DOT testified that Manager A had told the Director of DOT that Manager A had talked to Appellant. H.T. at 96. The Director of DOT also testified that it was the Director's belief that Manager A had sent Appellant some written information about the consequences of Appellant's continued absence. *Id.* However, the Director of DOT acknowledged that the Director never saw any written warning to Appellant with regard to Appellant's absences. *Id.* at 101-02. The County submitted no written documentation demonstrating that Manager A ever complied with the requirements of Article 26.2.

Finally, the Assistant Chief Administrative Officer testified that the Assistant Chief Administrative Officer was unaware of any written warnings given to Appellant. H.T. at 112. The County submitted no written documentation demonstrating that the Assistant Chief Administrative Officer or the Assistant Chief Administrative Officer's subordinates ever complied with the requirements of Article 26.2.

At the close of the Assistant Chief Administrative Officer's testimony, the County rested its case. H.T. at 112. The Board then ruled that the County, having failed to produce any evidence that it had complied with the requirements of Article 26.2 of the MCGEO CBA, did not provide Appellant with Appellant's due process rights and, therefore, the Board was ruling in favor of the Appellant. *Id.* at 113.

The Appropriate Remedy Is To Reinstatement Appellant To Appellant's Position Of Administrative Aide In The Department Of Transportation.

The record of evidence indicates that Appellant was still an employee of the Department of Transportation at the time of Appellant's termination. H.T. at 31, 33, 98.

⁸ The County was on notice prior to the hearing that the Board expected the County to prove its compliance with Article 26.2 during the hearing. *See* Decision on County's Motion in Limine at 4 n.6.

Appellant, along with Appellant's position, was not scheduled to transfer to MC311 until July 1, 2010. Id. at 31, 86. Accordingly, the appropriate remedy is to reinstate Appellant to the position of Administrative Aide in DOT. If Appellant's vacant position was moved to MC311 effective July 1, 2010,⁹ then the Board orders the County to return it to DOT for use by Appellant.

The Board has considered the issue of the transfer of Appellant to MC311. Both Manager B and the Assistant Chief Administrative Officer testified that employees had to complete the training course in order to work in MC311. Id. at 105. Manager B testified that there was not much work for Appellant absent completion of the training.¹⁰ Id. at 61. Manager B also testified that the training needed for MC311 is expensive. H.T. at 69. Accordingly, the Board has determined that it will not order the County to provide training solely to Appellant for the purpose of transferring Appellant to MC311. Rather, Appellant is to remain an employee in DOT.

ORDER

Based on the foregoing, the Board sustains the appeal and orders the County to do the following:

- 1) Reinstatement Appellant with back pay and benefits to the position of Administrative Aide in DOT;
- 2) If Appellant's position was transferred to MC311, transfer the position back to DOT;
- 3) Remove from all personnel and administrative records any reference or document pertaining to Appellant's termination; and
- 4) Pay reasonable attorney fees and costs. Appellant must submit a detailed request for attorney fees to the Board with a copy to the Office of the County Attorney within ten (10) calendar days from the date of this Final Decision. The County Attorney will have 10 days from receipt to respond. Fees will be determined by the Board in accordance with the factors stated in Montgomery County Code, Section 33-14(c)(9).

⁹ Manager B testified that if Manager B hadn't agreed to take Appellant, Manager B would not have received the position occupied by Appellant. H.T. at 77, 86.

¹⁰ Indeed, the Assistant Chief Administrative Officer testified that the Assistant Chief Administrative Officer placed Appellant on paid administrative leave after Appellant received the Notice of Intent to Terminate, as Appellant had no training so could not answer the phones at the call center, and the Assistant Chief Administrative Officer supported management's decision that Appellant be put on leave rather than have the employees at the call center see Appellant not working while they worked very hard. H.T. at 108.

SUSPENSION

CASE NO. 11-02

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of the Montgomery County, Maryland, Department Director to suspend Appellant for ten days.

FINDINGS OF FACT

Appellant is a manager for the County. An Administrative Person works for Appellant. On April 24, 2009, the Administrative Person filed a formal complaint with the County, alleging that Appellant had subjected the Administrative Person to sexual harassment in the workplace. Joint (Jt.) Ex. 5; Jt. Ex. 6 at 2.¹ The Administrative Person alleged that Appellant engaged in sexual harassment towards the Administrative Person between the dates of October 2008 and April 2009. Jt. Ex. 6 at 2.

On May 19, 2009, both Supervisor A and Investigator B of the County's Investigation Team sent the Department Director and Appellant a memorandum regarding the investigation of the complaint from the Administrative Person. Jt. Ex. 5. Specifically, they notified both the Department Director and Appellant that they were the investigators assigned to this matter and that they "will promptly commence" the investigation. Id.

On July 6, 2009, Investigator C began working for the Investigation Team. H.T. at 27. Investigator C was assigned the Administrative Person's investigation along with five other cases. Id. According to Investigator C, Investigator C received the Administrative Person's investigation assignment on July 17, 2009 and began the Administrative Person's investigation on July 20, 2009. Id. at 27-28.

While Investigator C was investigating the Administrative Person's complaint, two witnesses decided to file their own individual complaints against Appellant. H.T. at 31. Thus, two more cases were opened as a result of the Administrative Person's investigation. Id. Specifically, Ms. D and Mr. E filed complaints. Id. at 32. Investigator C viewed these complaints as intertwined with the Administrative Person's investigation, as they involved some of the same witnesses. Id. Investigator C interviewed a total of fifteen witnesses, some of them two or three times, for the Administrative Person's investigation. Id. at 40, 41. In addition, there were several witnesses that were hesitant about speaking with Investigator C, and Investigator C encountered difficulty with scheduling interviews with them. Id. at 39.

¹ Both the County and Appellant filed similar exhibits. At the start of the hearing in this matter, the County suggested that six exhibits be stipulated to by the parties. Hearing Transcript (H.T.) at 7-9. Appellant agreed, and the stipulated exhibits became Joint Exhibits 1-6. Id. at 9.

Investigator C testified that Investigator C never went to Investigator C's supervisor, Supervisor A, to seek help in completing the investigation into the Administrative Person's complaint, as Investigator C believed Investigator C was doing the investigation in "record time" and therefore did not believe that there was a problem with regard to the time it was taking to complete the investigation into a complaint, such as the Administrative Person's complaint, with many issues.² Id. at 60-61.

Investigator C concluded the Administrative Person's investigation, as well as the Ms. D investigation, by October 13, 2009.³ H.T. at 47, 51. Investigator C then reviewed some personnel records and drafted the reports of investigation. Id. at 51. On December 29, 2009, Investigator C sent the Administrative Person's investigation report to the Assistant County Attorney of the County Attorney's Office for legal review. Id. at 42, 78.

The Assistant County Attorney testified that the Assistant County Attorney looked at the draft of the Administrative Person's report within a day or two after receiving it. H.T. at 78. However, the Assistant County Attorney did not actually work on the Assistant County Attorney's comments on the draft until March 21, 2010. Id. According to the Assistant County Attorney, during the first full week in January, the Assistant County Attorney developed a health problem that impaired the Assistant County Attorney's ability to work. Id. at 79. Despite being disabled, the Assistant County Attorney testified that the Assistant County Attorney continued to come to work. Id. at 83. The Assistant County Attorney did not consider taking sick leave because the Assistant County Attorney was able to get to work and could do some things. Id. at 84. The Assistant County Attorney never went to the Assistant County Attorney's supervisor to tell the supervisor that the Assistant County Attorney couldn't perform all of the Assistant County Attorney's work. Id. On March 21, 2010, the Assistant County Attorney came to work and drafted the Assistant County Attorney's comments on the Administrative Person's investigation. Id. at 78. The Assistant County Attorney left a hard copy of the Assistant County Attorney's comments for Investigator C to pick up.⁴ Id. at 78-79.

A memorandum, dated April 30, 2010, containing the results of the Administrative

² Investigator C's supervisor, Supervisor A, testified that Investigator C never asked for assistance with regard to the investigation. H.T. at 72. According to Supervisor A, Supervisor A continuously talked with Investigator C about the Administrative Person's case. Id.

³ According to Investigator C, Investigator C concluded the Mr. E investigation earlier this year. H.T. at 47-48. Investigator C's office made a finding of insufficient evidence to support the complaint. Id. at 55, 56. Investigator C testified that the charge in the Statement of Charges issued to Appellant regarding racist comments that Appellant purportedly made to Mr. E are not supported by the investigation conducted into Mr. E's complaint. Id. at 57.

⁴ Investigator C testified that Investigator C contacted the Assistant County Attorney several times via email to ascertain the status of the Assistant County Attorney's review. H.T. at 43.

Person's investigation was issued by Investigator C to the Director.⁵ The Director received it on May 5, 2010. Jt. Ex. 6.

The investigation was forwarded by the Department Director to the Manager, Appellant's second-line supervisor. H.T. at 102. The Manager held discussions about the investigation with the Department Director, Supervisor F, Appellant's first-line supervisor, and Mr. G of the County Attorney's Office. H.T. at 102, 92. The Manager drafted a Statement of Charges for the Director's review. *Id.* at 102. During this time, the Manager became aware from Supervisor F that Appellant was scheduled to be off on sick leave. H.T. at 94, 102-03. Accordingly, because of Appellant's medical situation, the Department asked the Director, OHR, whether it could delay the issuance of the Statement of Charges (SOC) to Appellant.⁶ H.T. at 103-04. The OHR Director indicated that because Appellant was on medical leave, the thirty day deadline to issue the SOC could be waived under the Personnel Regulations. Jt. Ex. 4. The OHR Director cautioned the Department that the delay in issuing the SOC should be as "brief as possible, so as not to cause timely notification issues." *Id.* at 2.

Appellant received the SOC, proposing Appellant's demotion, on June 9, 2010. *See* Appeal Form. Appellant responded to the SOC on July 15, 2010. Jt. Ex. 2. In Appellant's response, Appellant raised the issue of timeliness of the disciplinary action and the fact that some of the incidents with which Appellant was charged were more than two years old. Jt. Ex. 2 at 1, 6. On August 4, 2010, the Director issued Appellant a Notice of Disciplinary Action – 10 Day Suspension (NODA).⁷ Jt. Ex. 3. Appellant was suspended for ten days, effective August 25, 2010. *Id.*

This appeal followed.

APPLICABLE LAW AND REGULATIONS

Montgomery County Code, Chapter 2A, Administrative Procedures Act, Section 2A-8. Hearings, which states in applicable part,

⁵ According to Investigator C, although Investigator C drafted and dated the memorandum on April 30, 2010, Investigator C probably did not send it out until the following Monday, May 3, or Tuesday, May 4. H.T. at 44-45.

⁶ Pursuant to the Montgomery County Personnel Regulations (MCPR or Personnel Regulations), a Statement of Charges should be issued within 30 days of when a department director became aware of the employee's conduct. MCPR, Section 33-2(b)(1).

⁷ In the NODA, the Department Director stated that the Department Director recognized that if Appellant was going to be disciplined, there was a strong interest in receiving prompt discipline. Jt. Ex. 3 at 1. Because of the substantial time that had elapsed since the events described in the SOC, as well Appellant's work record, the Department Director reduced the level of discipline. *Id.*

- (d) **Burden of going forward with the evidence.** The charging party shall have the burden of going forward with the production of evidence at the hearing before the hearing authority; provided, however, where a governmental agency or an administrative authority is a party, such agency or administrative authority shall have the burden of going forward with the production of evidence at the hearing before the hearing authority. Such evidence shall be competent, material and relevant to all matters at issue and relief requested.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended October 21, 2008), Section 5, *Equal Employment Opportunity*, which states in applicable part:

5-2. Policy on equal employment opportunity

- (b) Montgomery County must:
 - (1) enforce Federal, State, and local laws that prohibit employment discrimination in the workplace;
 - (2) conduct all employment activities in a manner that ensures equal employment opportunity for all persons without regard to race, color, religion, national origin, ancestry, sex, marital status, age, disability, sexual orientation, or genetic status; and
 - (3) fairly and expeditiously investigate and resolve complaints.
- (c) Supervisors and managers must ensure that employees are provided with a work environment free from discrimination and harassment of any kind.

MCPR, 2001 (as amended December 11, 2007, October 21, 2008, and November 3, 2009), Section 33, *Disciplinary Actions*, which states in applicable part:

33-2. Policy on disciplinary actions

- (b) ***Prompt discipline***
 - (1) A department director should start the disciplinary process promptly and issue a statement of charges within 30 calendar days of the date on which the supervisor became aware of the employee's conduct, performance, or attendance problem.
 - (2) A department director may wait for more than 30 calendar days to issue a statement of charges if an investigation of the employee's conduct or other circumstances justify a delay.

POSITIONS OF THE PARTIES

County:

- The regulation governing discipline does not mandate a Statement of Charges be issued in 30 days. It just states that discipline should be prompt.
- The rule about prompt discipline is aimed at the Department, not the Investigation Team.
- The word “should” in the discipline regulation is directory in nature; not mandatory. Therefore, under applicable Maryland case law, the standard for reviewing the timeliness issue is an arbitrary and capricious standard.
- Under an arbitrary and capricious standard, the courts look to whether the employee was prejudiced. Appellant was not prejudiced by the one-year delay. Appellant was put on notice of the charge when Appellant received the May 19, 2009 memorandum from the Investigation Team.
- In Appellant’s Prehearing Submission, Appellant never raised the issue of the one-year delay in the investigation; instead, Appellant focused on the thirty-day time frame for issuing the SOC.
- The Administrative Person never complained to the Administrative Person’s management; instead, the Administrative Person went to the Investigation Team. The Investigation Team conducted an investigation and did not act as an agent of the Department in conducting the investigation.
- The investigation took a long time to complete for a number of reasons, including the fact that an investigation of a hostile work environment complaint is going to be more complicated than a routine investigation of misconduct.
- The Investigation Team attempts to do an impartial investigation, and interviewed witnesses suggested by Appellant. Fifteen witnesses were interviewed and several were reinterviewed.
- Two additional complainants came forward, filing complaints against Appellant, while the investigation into the Administrative Person’s complaint was being conducted.
- A number of witnesses were reluctant to give full candid statements to the Investigator, fearing retaliation by Appellant.
- The custom in Montgomery County is to have an investigation report reviewed by the County Attorney’s Office before it is issued.
- The Assistant County Attorney who was the reviewer for the Administrative Person’s investigation report had a health problem which delayed the Assistant County Attorney completing the Assistant County Attorney’s review of the report.
- Under Board precedent, when there was a timeliness issue with regard to the discipline, the Board did not vacate the entire disciplinary action; instead, it lowered the penalty. Based on this previous Board decision, the Department tried to remediate for the timeliness issue by lowering the penalty against Appellant from a demotion to a ten-day suspension.

Appellant:

- The thirty-day time frame for issuing an SOC is a standard that Appellant, as a manager, has had to abide by when initiating a disciplinary action against a subordinate. It is no small matter.
- The County did not issue the SOC until June 7, 2009, some thirty-three days after it received the Administrative Person's investigation. Appellant never agreed to an extension of the thirty-day time limit set forth in the regulations.⁸
- Appellant was prejudiced by the length of time it took to complete the investigation as it makes it much harder to even address some of the matters as they are so old. One issue, the allegation about influencing a member of an interview panel, purportedly occurred in June 2008.
- The County's Personnel Regulations governing EEO complaints require the Investigation Team to conduct an expeditious investigation. The one-year time period for completing the Administrative Person's investigation does not meet the regulatory requirement for an expeditious investigation.
- The Assistant County Attorney delayed the issuance of the investigation report needlessly. If the Assistant County Attorney was unable to do the work the Assistant County Attorney was charged with completing, the Assistant County Attorney should have asked the Assistant County Attorney's supervisor for assistance.
- Investigator C testified that, with regard to Mr. E's investigation, there was insufficient evidence to support the charge relating to the purported racist comment, yet the charge is still being used to take disciplinary action against Appellant.

ANALYSIS AND CONCLUSIONS

We note at the outset that Appellant has been charged with serious misconduct. The genesis of the disciplinary action at issue here was the complaint by the Administrative Person to the Investigation Team that the Administrative Person was being sexually harassed by Appellant. See Joint Exhibit 1 at 2. As we have previously held, the County is entitled to hold its supervisors to a higher standard of conduct. See MSPB Case No. 10-04 (2010); MSPB Case No. 09-11 (2009); MSPB Case No. 07-13 (2007); MSPB Case No. 05-05 (2005). This is particularly true as supervisors, under County policy, are responsible for maintaining a work environment free of sexual harassment. See Montgomery County Policy on Sexual Harassment (Sexual Harassment Policy) at 1 available at <http://www.montgomerycountymd.gov/content/ohr/ResourceLibrary/RLMain1.cfm?m=1&c=6>; see also Payne v. USPS, 74 M.S.P.R. 419, 428 (upholding a removal of a supervisor for sexual harassment, as the supervisor was responsible for maintaining a work environment

⁸ The Board notes that Appellant indicated in Appellant's Appeal that Appellant received the SOC on June 9, 2010. Because the Department sought and received approval from the Director, OHR to delay the service of the SOC due to Appellant's medical condition, the Board finds that there is no issue of timeliness with regard to this matter. The Board would point out to Appellant that nowhere in the Personnel Regulations is there a requirement for the Department Director to get an employee's approval before delaying issuance of a SOC.

free of sexual harassment).

However, it was the County itself which raised with the Board the issue of the timeliness of Appellant's discipline.⁹ Specifically, in its Prehearing Submission, the County moved to bifurcate the instant appeal and have the Board conduct a preliminary evidentiary hearing on the "timeliness of discipline" issue. County Prehearing Submission at 2. In support of this request, the County stated that "[g]iven the period of time that elapsed between the occurrence of conduct that is the subject of the disciplinary action, and the initiation of the disciplinary action, the County recognizes that the Appellant's 'timeliness' defense is a reasonable, plausible defense."¹⁰ *Id.* Appellant agreed with the County's position regarding bifurcation and, accordingly, the Board granted the County's motion to bifurcate. On December 9, 2010, the Board held a hearing on the issue of timeliness of Appellant's suspension action.

Given the Board's ruling today with regard to Appellant's affirmative defense of timeliness,¹¹ the Board will not reach the merits of the charges against Appellant.

Under Supreme Court Precedent, To Avoid Liability For A Supervisor Creating A Hostile Work Environment, The County Must Exercise Reasonable Care To Prevent And Correct Promptly Any Sexually Harassing Behavior. The County Has Promulgated A Policy And Procedures To Meet This Standard.

In the case of *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Supreme Court held that where an employee alleges sexual harassment:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see *Fed. Rule Civ. Proc. 8(c)*. The defense comprises two necessary

⁹ As previously noted, the Director in the NODA also recognized the issue of the substantial time that had elapsed since the events described in the SOC had occurred. *Jt. Ex. 3* at 1.

¹⁰ During the County's opening statement in the hearing in this matter, the County's attorney acknowledged that the County's attorney saw as the "big issue the one-year investigation period prior to the issuance of the report." *H.T.* at 17.

¹¹ Although the County is correct that Appellant did not raise the issue of the timeliness of the investigation in Appellant's Prehearing Submission, Appellant did raise the matter of timeliness and the reliance on alleged incidents more than two years old in Appellant's response to the SOC. *Jt. Ex. 2* at 6. Appellant also raised during the hearing the difficulty in addressing various charges in the SOC, given the length of time that had passed since the events occurred. *H.T.* at 19.

elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

524 U.S. 807-08. See also Burlington Industries v. Ellerth, 524 U.S. 742, 765 (1996). As the Ellerth Court explained, the Court adopted this approach because it recognized that Title VII of the Civil Rights Act encourages the creation of antiharassment policies and effective grievance mechanisms on the part of an employer. Id. Therefore, employer liability for sexual harassment by a supervisor of the employer should depend in part on the employer's effort to create such procedures. Id. The Ellerth Court also noted that limiting employer liability based on an effective employer mechanism for dealing with a complaint of sexual harassment would encourage employees to report harassing conduct before it becomes severe or pervasive, thus serving Title VII's deterrent purpose. Id.

The County has set forth its equal employment opportunity policy in Section 5 of the MCPR. It specifically states that "Montgomery County *must* fairly and *expeditiously* investigate and resolve complaints." MCPR, Section 5-2(b)(3) (emphasis added). Indeed, during the hearing, the head of the Investigation Team, Supervisor A, stated that Supervisor A was aware that the Personnel Regulations mandate that an expeditious investigation be done.¹² H.T. at 70-71. Likewise, Investigator C also testified that Investigator C was aware that the Personnel Regulations require an expeditious investigation. Id. at 52.

As the County pointed out during its closing arguments in this case, the Court of Appeals for Maryland has held that where a statute has the word "must" in it, then the word is mandatory as opposed to directory.¹³ H.T. at 114. Specifically, the Court of Appeals in

¹² According to Supervisor A, it is Supervisor A's view that the issuance of the investigation report to the Department over a year after the complaint was filed with the Investigation Team met the requirement for an expeditious review. H.T. at 71. As will be discussed in greater detail infra, the Board totally rejects Supervisor A's view and finds that the Investigation Team failed to exercise reasonable diligence in completing the investigation and report.

¹³ The Court of Appeals has also held that when interpreting regulations, the Court will "generally employ the same rules applicable to statutes." Department of Public Safety

Walzer v. Osborne, 393 Md. 563, 911 A.2d 427 (2006) stated:

It remains a well-settled principle of this Court that “[w]hen a legislative body commands that something be done, using words such as ‘shall’ or ‘must,’ rather than ‘may’ or ‘should,’ we must assume, absent some evidence to the contrary, that it was serious and that it meant for the thing to be done in the manner directed.”

393 Md. at 580, 911 A.2d at 436 (quoting Thanos v. State, 332 Md. 511, 522, 632 A.2d 768, 763 (1993) (quoting Tucker v. State, 89 Md. App. 295, 298, 598 A.2d 479, 481 (1991)); Mayor and Town Council of Oakland v. Mayor and Town Council of Mountain Lake Park, 392 Md. 301, 328, 896 A.2d 1036, 1052 (2006); Gorge v. State, 386 Md. 600, 613, 873 A.2d 1171, 1179 (2005); see also State v. Green, 367 Md. 61, 82, 785 A.2d 1275, 1287 (2001). Thus, pursuant to the Personnel Regulations, the County is required to expeditiously investigate a complaint of discrimination.¹⁴

To the County’s credit, in addition to the Personnel Regulations, the County has promulgated and posted on the Office of Human Resources’ website the Montgomery County Policy on Sexual Harassment (Sexual Harassment Policy).¹⁵ The Sexual Harassment Policy sets certain deadlines for dealing with a complaint of sexual harassment. Specifically, employees subject to sexual harassment “should immediately” report the matter. Sexual Harassment Policy at 2. A person receiving a complaint of sexual harassment “must” notify

and Correctional Services v. Howard, 339 Md. 357, 369, 663 A.2d 74, 79 (1995) (quoting Chesapeake v. Comptroller, 331 Md. 428, 440, 628 A.2d 234, 240 (1993)).

¹⁴ As the Supreme Court counseled in Faragher and Ellerth, the only way for the County to avoid liability for sexual harassment committed by one of its supervisors is to exercise reasonable care to prevent and promptly correct any sexually harassing behavior. Failure by the County to have an effective procedure to address sexual harassment could result in significant liability. See, e.g., Valetin-Almeyda v. Municipality of Aguadilla, 447 F.3d 85, 99 (1st Cir. 2006) (upholding, *inter alia*, a Title VII award of \$250,000 in compensatory damages against the Municipality. In so doing, the court found that, although the Municipality had an antiharassment policy, there was no evidence that it exercised reasonable care to prevent and correct promptly any harassing behavior). Cf. Rudd v. Shelby County, 166 Fed. Appx. 777, 778-79 (6th Cir.), *cert. denied*, 549 U.S. 823 (2006) (upholding a district court’s overturning of a jury award of \$1,000,000 in compensatory damages to the plaintiff in a sexual harassment complaint. In so doing, the court found that the County took prompt and effective action, beginning its investigation within five days of receiving the harassment complaint and in little over a month notifying the perpetrator of the harassment of the discipline it intended to impose on him).

¹⁵ The Sexual Harassment policy was approved for form and legality by the County Attorney on July 31, 1996 and approved by the County Executive on August 1, 1996. Sexual Harassment Policy at 4. It was effective immediately. Id.

the Investigation Team or an attorney in the County Attorney's Office *within 24 hours*. *Id.* (emphasis added). The Investigation Team or an attorney in the County Attorney's Office "will" initiate the investigation of a complaint *within 24 hours* after the allegation is brought to his or her attention or notice is received that an attempt at informal resolution has been unsuccessful. Sexual Harassment Policy at 3 (emphasis added). To the extent possible, the investigation and attempts to resolve the complaint "will" be completed *within fourteen working days* of the filing of the complaint. *Id.* (emphasis added).

In addition to the Sexual Harassment Policy, on the OHR website, under the heading "HR Topics", the following guidance is also found: "Sexual Harassment and Employment Discrimination, County Policies and Guidelines for Complaints" (Guidelines).¹⁶ The purpose of the Guidelines is to discuss the Montgomery County Policy on Sexual Harassment. The Guidelines indicates that "[t]he County, through its new policy, seeks to address and remedy all allegations of sexual harassment *as quickly and appropriately as possible*, using *all the resources and remedial actions available to the County*." Guidelines at 1 (emphasis added).

In these Guidelines, employees, supervisors, and the Investigation Team or an attorney in the County Attorney's Office are all charged with taking action expeditiously to deal with allegations of sexual harassment. The time frames established in the Sexual Harassment Policy are mirrored in the Guidelines (e.g., an employee subjected to sexual harassment "should immediately" report the sexual harassment; the supervisor/department director who receives a complaint of sexual harassment "must" report the complaint *within 24 hours* to the Investigation Team or an attorney in the County Attorney's Office; the Investigation Team or an attorney in the County Attorney's Office "must" begin an investigation of a complaint *within 24 hours after* it is received or after notice is received that attempts to resolve the complaint informally were unsuccessful; completion of an investigation and attempts to resolve the complaint, to the extent possible, is to be accomplished *within 14 working days* of the filing of the complaint). Clearly, this guidance adheres to the Supreme Court's mandate that the County, as an employer, exercise reasonable care to prevent and correct promptly any sexually harassing behavior and also meets the requirement of the Personnel Regulations that the County "must" expeditiously investigate and resolve EEO complaints. Such a policy, if enforced, would provide County employees with an effective means of having harassment in the workplace addressed.

The Board notes, had the County adhered to its policy and procedures for dealing with a complaint of sexual harassment as publicized on its website, the Board would not be issuing this Final Decision today. However, as discussed in greater detail *infra*, both the Investigation Team and the County Attorney's Office failed to meet their responsibilities to deal with the complaint of sexual harassment made by the Administrative Person against Appellant in an expeditious manner as mandated by the Personnel Regulations.

¹⁶ The date of publication of this HR Topic is July 1997. See Guidelines available at <http://montgomerycountymd.gov/content/ohr/ResourceLibrary/RLMain1.cfm?m=13&c=8>.

The Personnel Regulations Charge A Department Director With Taking “Prompt Discipline” Against An Employee. The Discipline Taken Against Appellant Was Not Prompt.

Even the County’s attorney has acknowledged that the Personnel Regulations indicate that a disciplinary action should be issued promptly. H.T. at 15; see also MCPR, Section 33-2(b). While the Personnel Regulations do not define the phrase “prompt discipline”, they do indicate that the Department Director should issue a Statement of Charges within 30 calendar days of when the supervisor became aware of the employee’s conduct. The Department Director may, under the Personnel Regulations, wait more than 30 calendar days to issue a statement of charges if an investigation of the employee’s conduct or other circumstances justify a delay.

In the instant case, the Department Director issued the Statement of Charges to Appellant over one year after the Department Director became aware of the alleged misconduct by Appellant. The Board finds today that the investigation into Appellant’s alleged misconduct, which took over a year to complete from the date the Investigation Team received the Administrative Person’s complaint, does not justify the delay that occurred. Accordingly, the Board will dismiss the disciplinary action based upon a lack of timeliness.

A. Under Applicable Case Law, the Department Director Was Put On Notice With Regard To Appellant’s Alleged Misconduct On Or About May 19, 2009.

In the case of Western Correctional Institute v. Geiger, 371 Md. 125, 807 A.2d 32 (2002), the Court of Appeals of Maryland addressed the meaning of a State personnel regulation which provided that an appointing authority may impose disciplinary action no later than 30 days after the appointing authority acquires knowledge of the misconduct for which the disciplinary action is imposed. In Geiger, the Court noted that the phrase “when the appointing authority acquires knowledge of the misconduct” was not further defined in the statute. 371 Md. at 143, 807 A.2d at 43. The Court went on to hold that knowledge sufficient to order an investigation into a matter is knowledge of the misconduct. 371 Md. at 144, 807 A.2d at 43-44.

The statutory provision at issue in Geiger is similar in nature to the one found in the MCPR, which provides that a department director should start the disciplinary process promptly and issue a statement of charges within 30 calendar days of the date on which the supervisor became aware of the employee’s conduct, performance, or attendance problems. Thus, the time limit found in both the statutory and regulatory provisions starts to run from when the appointing authority/supervisor has knowledge of the misconduct.

On or about May 19, 2009, the Investigation Team sent the Department Director a memorandum indicating that the Administrative Person had filed a formal complaint alleging that Appellant had sexually harassed the Administrative Person. Jt. Ex. 5. Both Appellant’s first-line supervisor, Supervisor F, and Appellant’s second-line supervisor, the Manager, were aware of the memorandum. H.T. at 90, 100. Thus, management in the Department was on notice in May 2009 of Appellant’s alleged misconduct. However, they took no action at

that time. *Id.* at 91-92, 100-01. Instead they chose to wait *over a year* for the Investigation Team to conclude its investigation into the complaint, *id.*, even though the Personnel Regulations require management to ensure that employees are provided a workplace free from harassment of any kind.¹⁷ MCPR, Section 5-2(c).

B. The MCPR Provides For An Exception To The Thirty-Day Time Limit For Issuing A Statement Of Charges Where An Investigation Of The Employee's Conduct Justifies A Delay. For An Investigation To Justify A Delay In Issuing A Statement Of Charges, It Must Be Conducted With Reasonable Diligence.

While the MCPR calls for “prompt discipline”, it also indicates that a Department Director may wait for more than 30 calendar days to issue a Statement of Charges if an investigation of the employee’s conduct or other circumstances justify a delay. MCPR, Section 33-2(b)(2). The County asserts that, as the Investigation Team notified the Department Director that it was conducting an investigation into the sexual harassment allegation, the Department, as is standard County practice, waited for the report of the investigation. H.T. at 12.

Nowhere in the regulation is the phrase “if an investigation of the employee’s conduct or other circumstances justify a delay.” As the County’s attorney pointed out in the County’s opening statement, this is the first time that the Board has been asked to deal with the issue of timeliness involving an investigation being conducted by an organization outside of the Department. H.T. at 10. The County’s attorney specifically asked the Board to provide ground rules for how situations such as the instant case should be handled in the future. *Id.* The County’s attorney also noted that the Board’s decision in the instant case, in terms of its reasoning, is going to impact on other cases that involve investigations that may occur later. *Id.* at 17.

Accordingly, the Board is granting the County’s attorney’s request for guidance. The Board holds today that, in order for an investigation to justify a delay in issuing a Statement of Charges beyond the 30 days set forth in the Personnel Regulations, the investigation must progress steadily from the date a complaint is filed with the Investigation Team. The Board declines to adopt a hard and fast rule as to how soon an investigation must be concluded; that determination will depend on the complexity of the investigation. However, the Board will not countenance as a reason for a delay in issuing a Statement of Charges an investigation that was not conducted and concluded with reasonable diligence. As is discussed in greater detail *infra*, the Board finds that the Investigation Team and the Office of the County Attorney did not exercise reasonable diligence in concluding the investigation into the Administrative Person’s complaint and conveying its results to the Department.

¹⁷ The MCPR states: “Supervisors and managers must ensure that employees are provided with a work environment free from discrimination and harassment of any kind.” MCPR, Section 5-2(c). Obviously, the Department failed to meet this mandatory directive when it waited *over a year* to act on the charge of sexual harassment.

C. The Investigation Team Failed To Demonstrate Reasonable Diligence In Investigating The Administrative Person's Complaint Against Appellant.

Pursuant to the County's own policies, found on the OHR website, the Investigation Team is to commence an investigation of a complaint of sexual harassment *within 24 hours* after it is received.¹⁸ Sexual Harassment Policy at 3; Guidelines at 6. In the instant case, the Administrative Person filed the complaint with the Investigation Team on April 24, 2009. H.T. at 27, 53, 71. Despite the guidance calling for an investigation to begin *within 24 hours* after receipt of a complaint, the Investigation Team inexplicably did not even send out the notice announcing the receipt of the complaint and the start of the investigation until May 19, 2009,¹⁹ *some 25 days* after receipt of the complaint. Jt. Ex. 5.

Significantly, in its notification to the Department Director and Appellant about the receipt of the complaint on May 19, 2009, the Investigation Team states it would "promptly commence the investigation". However, inexplicably²⁰ the Investigation Team did not move forward immediately with the investigation. Instead, nothing was done at that time.²¹

Investigator C testified that Investigator C started as an investigator with the

¹⁸ Alternatively, the Investigation Team is to commence an investigation within 24 hours after being notified that attempts to resolve the complaint informally were unsuccessful. Guidelines at 6. Under the Guidelines, if a supervisor receives a sexual harassment complaint, he/she may investigate the complaint and attempt to resolve it informally with the concurrence of the Investigation Team and the County Attorney's Office. Id. at 5. However, based on the testimony received at the hearing, the Administrative Person never notified the Administrative Person's management chain about the complaint but instead went directly to the Investigation Team. H.T. at 88, 100. Thus, under the Guidelines, the Investigation Team was tasked with beginning its investigation into the complaint *within 24 hours* of receiving it on April 24, 2009.

¹⁹ According to Investigator C, April 24, 2009 was the date on which the initial intake was performed for the Administrative Person's complaint; it was not actually accepted as a complaint until May 9. H.T. at 53. Investigator C never provided any explanation as to why it was necessary for the Investigation Team to wait so long to "accept" the complaint.

²⁰ The Board notes that the County was put on notice prior to the start of the hearing that it was required to produce evidence justifying the need for the County to take over a year to complete the investigation from the date of the Administrative Person's complaint. See Decision on County's Motion to Bifurcate at 3. The Board warned the County that absent a satisfactory explanation justifying the delay, the Board would rule against the County. Id. Thus, it was incumbent on the County during the hearing to provide reason(s) for the delay in the investigation.

²¹ This is particularly noteworthy, as Investigator C testified that at the time Investigator C came on board in July 2009, there was another investigator on the Investigation Team, as well as the supervisor of the team, Supervisor A. H.T. at 59. Moreover, Supervisor A testified that Supervisor A also did investigations. Id. at 71.

Investigation Team on July 6, 2009. Yet, even then, nothing was done on the Administrative Person's complaint. Investigator C inexplicably²² did not receive the investigation as an assignment until July 17, 2009, *some eleven days* after Investigator C began working for the Investigation Team and *almost two months* after the Investigation Team's memorandum about the start of the investigation. Investigator C did not commence the investigation until July 20, 2009, *over two months* after the memorandum was issued and *nearly three months after* the Administrative Person filed the complaint with the Investigation Team. Quite clearly, at this point, there was no way that the Investigation Team could meet the time limit in the County's Sexual Harassment Policy and Guidelines for completing the investigation (i.e., *14 working days* from the date of the filing of the complaint).

It would appear from the record of evidence ascertained during the hearing that once Investigator C began the investigation into the Administrative Person's complaint, the investigation appeared to progress steadily, with Investigator C interviewing witnesses, opening two additional investigations based on witnesses coming forward to file complaints, and then reinterviewing witnesses as needed. By October 13, 2009, Investigator C had completed the investigation. Yet again, inexplicably,²³ the investigation report was not completed and forwarded to the Office of the County Attorney until December 29, 2009, *over two months* after the completion of the last investigatory interview.

Investigator C received the investigation report back from the County Attorney's Office on March 24, 2009. H.T. at 42. However, it took *over a month* for Investigator C to send the investigation report to the Department.²⁴ *Id.* at 44-45. No explanation was provided by Investigator C as to why it took Investigator C over a month to finalize the report.

D. The County Attorney's Office Failed To Exercise Reasonable Diligence In Reviewing The Investigation Report.

The record of evidence reflects that it is the County's practice to have a draft investigation report reviewed by an attorney in the Office of the County Attorney prior to it being finalized. H.T. at 42-43, 76-77. In the instant case, the Assistant County Attorney of the County Attorney's Office was assigned to review the administrative person's investigation. *Id.* at 76. The Assistant County Attorney testified that the Assistant County

²² See note 20 *supra*.

²³ Investigator C testified that, after Investigator C completed the interviews in the Administrative Person's investigation, Investigator C reviewed personnel records and then wrote drafts of the investigation. H.T. at 51. However, Investigator C never did explain why it took over two months to complete these tasks.

²⁴ The exact date on which Investigator C forwarded the report of investigation to the Department is unclear. The memorandum to the Department is dated April 30, 2010. Jt. Ex. 6 at 1. However, Investigator C testified that although Investigator C drafted the memorandum on April 30, Investigator C may not have actually sent it out until the following Monday, which was May 3, or Tuesday, May 4. H.T. at 44-45.

Attorney received the report via email on December 29, 2009 and looked at it a day or two after receiving it. Id. at 78. The Assistant County Attorney did not complete the Assistant County Attorney's review of the report, however, until March 21, 2009, almost *three months* after the Assistant County Attorney received it.

The Assistant County Attorney testified that the delay was due to the fact that the week after the Assistant County Attorney received the report, the Assistant County Attorney developed a health problem which impaired the Assistant County Attorney's ability to work. H.T. at 79. The Assistant County Attorney testified that, even though the Assistant County Attorney was incapacitated, the Assistant County Attorney did not consider going on sick leave. Id. at 84. The Assistant County Attorney acknowledged that the Assistant County Attorney's ability to work was "extremely slowed down". Id. Nevertheless, the Assistant County Attorney never asked the Assistant County Attorney's supervisor for assistance because the Assistant County Attorney couldn't do all the Assistant County Attorney's work; rather, on occasion the Assistant County Attorney asked the Assistant County Attorney's administrative assistant to do some clerical work for the Assistant County Attorney. Id.

During the Assistant County Attorney's testimony, the Assistant County Attorney described the reason for the Assistant County Attorney's inattention with regard to the review of the investigation report:

- Q: Okay. Given the serious nature of the allegations in the report, did, at any time during this time while the document was sitting there, did it ever occur that this needed to be moved along at some point prior to March 21st?
- A: Well, there were a lot of things that needed to be moved along, and I got to them as I could. This one in particular did it stand out with the other things that were going on, not in particular.

H.T. at 82.

We agree with Appellant that, given the serious allegations in the investigation report on the complaint of sexual harassment, it was incumbent upon the Assistant County Attorney to review the report more expeditiously than the Assistant County Attorney did. If the Assistant County Attorney believed the Assistant County Attorney was too incapacitated to perform the Assistant County Attorney's duties, the Assistant County Attorney had an obligation to inform the Assistant County Attorney's supervisor and have the investigation report reassigned. This the Assistant County Attorney failed to do. Rather, despite the County's policy on the handling of sexual harassment complaints, which calls for the completion of an investigation into a sexual harassment complaint *within 14 working days from the receipt of the complaint*, the Assistant County Attorney let the report sit for *almost three months* as, to use the Assistant County Attorney's own words "it did not stand out." The Board finds that the Office of the County Attorney failed to exercise reasonable diligence with regard to the review of the investigation report.

The County Has Argued That The Appropriate Sanction For The Lack Of Timeliness In Issuing The Statement Of Charges Is A Mitigation Of The Penalty. Given The Failure Of Both The Investigation Team And The County Attorney's Office To Exercise Reasonable Diligence, The Board Has Determined The Appropriate Sanction Is The Rescission Of The Discipline Imposed.

The County argues that it recognized that there was an issue with the timeliness of the investigation and addressed the matter when it chose to mitigate the proposed demotion to a 10-day suspension. H.T. at 120. In support of this approach, the County cited to MSPB Case No. 03-07, where the Board found that the Department's handling of a disciplinary action supported mitigation of the penalty. In MSPB Case No. 03-07, the conduct at issue occurred on March 20, 2002. The Department investigated the matter and the investigation report was issued on April 24, 2002, a little more than a month after the incident. The SOC was issued to the appellant on June 6, 2002, forty-two (42) days after the investigation report was issued and seventy-four (74) days after the incident in question. While the County clearly exceeded the 30-day time limit in the Personnel Regulations for issuing the SOC in MSPB Case No. 03-07, the lack of timeliness was not egregious.

The same cannot be said in this case. Rather, the investigation into the complaint of sexual harassment took *over one year to complete* and Appellant is charged with incidents going back to August²⁵ and June 2008. Therefore, MSPB Case No. 03-07 is not controlling.

The Board warned the County at the time of the Prehearing Conference that, absent a satisfactory explanation for the delay in the completion of the investigation report,²⁶ it would rule against the County based on its failure to adhere to the Personnel Regulations. The Board holds today that the County has failed to provide a satisfactory explanation. The Board finds that both the Investigation Team and the Office of the County Attorney failed to exercise reasonable diligence to complete the investigation and the report of investigation in derogation of the Personnel Regulations' requirement to "expeditiously" investigate a complaint of sexual harassment.²⁷ Accordingly, the Board will order the discipline at issue

²⁵ The Board is extremely concerned that, given the testimony of Investigator C regarding the lack of evidence to support the allegation against Appellant concerning the alleged racist comment purportedly made by Appellant which occurred in August 2008, the County did not withdraw this charge before the hearing.

²⁶ The Board even permitted the County, after the Prehearing Conference and the issuance of its Decision on the County's Motion to Bifurcate, to add an additional witness so as to provide the County with every opportunity to present its case with regard to the issue of timeliness.

²⁷ The County has argued that, because the time frame in the Personnel Regulations is not mandatory in nature but directory, the Board should apply an arbitrary and capricious standard of review with regard to the timeliness of the discipline. H.T. at 18, 118. The County also acknowledged that, even if an arbitrary and capricious standard were applied, the County might still have problems regarding the timeliness issue. H.T. at 18. We agree.

be rescinded.

ORDER

Based on the foregoing, the Board sustains the appeal, and orders the County to revoke the ten-day suspension and make the Appellant whole for lost wages and benefits.

Clearly where, as here, the County has announced to its employees on its official website for over fourteen years that it will commence a sexual harassment investigation *within 24 hours of receipt* of a complaint, waiting *almost three months* to commence the investigation constitutes arbitrary and capricious conduct. Likewise, the County, although assuring employees on its official website for over fourteen years that an investigation into a sexual harassment will to the extent possible be completed *within 14 working days of receipt of a complaint of sexual harassment*, chose to take *over one year to complete* and transmit to the Department the results of the Administrative Person's sexual harassment investigation. This again constitutes arbitrary and capricious conduct on the part of the County. The Board finds that an employee, such as Appellant, is significantly prejudiced when forced to defend against charges that involve incidents almost two years old. Thus, even employing an arbitrary and capricious standard as urged by the County, the County would lose its case.

APPEALS PROCESS

DENIAL OF EMPLOYMENT

Montgomery County Code Section 33-9(c) permits any applicant for employment or promotion to a merit system position to appeal the decision of the Chief Administrative Officer (CAO) with respect to their application for appointment or promotion. In accordance with Section 6-11 of the Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, and July 20, 2010), an employee or an applicant may file an appeal directly with the Board alleging that the decision of the CAO on the individual's application was arbitrary and capricious, illegal, based on political affiliation or other non-merit factors, or that the announced examination and scoring procedures were not followed.

Section 35-3 of the MCPR specifies that the employee or applicant has ten (10) working days to file an appeal with the Board in writing after the employee or applicant receives notice that the employee or applicant will not be appointed to a County position. The employee or applicant need only file a simple written statement of intent to file an appeal. Upon receipt of the notice of intent, the Board's staff will provide the employee or applicant with an Appeal Form which must be completed within 10 working days. Upon receipt of the completed Appeal Form, the Board's staff notifies the County of the appeal and provides the County with fifteen (15) working days to respond to the appeal and forward a copy of the action or decision being appealed and all relevant documents. The County must also provide the employee or applicant with a copy of all information provided to the Board. After receipt of the County's response, the employee or applicant is provided with an opportunity to provide final comments.

After the development of the written record, the Board reviews the record to determine if it is complete. If the Board believes that the record is incomplete or inconsistent, it may require oral testimony to clarify the issues. If the Board determines that no hearing is needed, the Board makes a determination on the written record. The Board issues a written decision on the appeal from the denial of employment or promotion.

During fiscal year 2011, the Board issued the following decisions on appeals concerning the denial of employment.

EMPLOYMENT DECISIONS

CASE NO. 11-01

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of the Montgomery County's Department of Correction and Rehabilitation (DOCR) not to select Appellant for the position of Correctional Specialist II. The County filed its response (County's Response) to the appeal on August 10, 2010. Appellant was provided the opportunity to file a reply to the County's Response but did not do so.

FINDINGS OF FACT

Appellant is a Specialist, grade 23, in the Department of Health and Human Services. In a letter dated April 15, 2010, Appellant was notified that Appellant's position was going to be abolished in FY2011 for budgetary reasons.¹ On May 19, 2010, Appellant applied for a voluntary demotion to the Correctional Specialist II position in DOCR's Pre-Release and Reentry Services Division, pursuant to the "priority consideration" procedures of Article 27, Reduction-In-Force,² of the collective bargaining agreement between the County and the Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, AFL-CIO (MCGEO). Priority consideration is defined as:

[T]he right of all qualified affected and displaced employees to be considered for vacancies at or below the grade they hold as affected employees or from which they were displaced. Affected and displaced employees who apply for any vacancy at or below their grade and for which they are found qualified will be placed on a special list . . . for that position. Appointing authorities must make appointments from special eligible lists in lieu of filling vacancies by any other means.

Administrative Procedure 4-19, § 3.12.

As part of the screening process for candidates for the position of Correctional Specialist II, Appellant was required to complete a background booklet questionnaire which asked, inter alia, about Appellant's drug experimentation and history. See County's

¹ Appellant was informed the date of abolishment would be in November 2010.

² Article 27 mandates that Administrative Procedure 4-19 be followed when the County conducts a reduction-in-force. See Agreement between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, AFL-CIO and Montgomery County Government, Montgomery County, Maryland, For the Years July 1, 2007 through June 30, 2010, § 27.3.

Response, Attachment 2. Appellant acknowledged in response to this drug use questionnaire that Appellant had used marijuana 2-4 times in high school. Id. Appellant denied the use of hallucinogens. Id.

Appellant was also asked about Appellant's drug usage during the mandatory two-hour psychological examination which is given to applicants for the Correctional Specialist position. County Response at 2. In response, Appellant told Dr. A, the psychologist who examined Appellant, that Appellant had used marijuana once or twice a month during Appellant's senior year in high school. See County Response, Attachment 3. When asked by Dr. A about Appellant's use of hallucinogens, Appellant replied: "I think I did experiment with that as a matter of fact, accidentally someone gave it to me, same period – that high school year, once, didn't like it." Id.

The employment selection standards for correctional positions in the State of Maryland are set by the Maryland Police and Correctional Training Commissions (Maryland Correctional Training Commission). Ms. B, who does human resources for DOCR, upon learning of Appellant's acknowledgment of the use of a hallucinogen, contacted the Training Commission to ascertain whether the one time use of a hallucinogen constituted an automatic disqualifier of a candidate for a correctional position. See County Response, Attachment 4. The Deputy Director of the Correctional Training Commission confirmed to Ms. B that any prior use of a hallucinogen prohibits the certification of an applicant for a correctional position. Id.

By letter dated July 1, 2010, Ms. B notified Appellant that DOCR could not certify Appellant as a correctional employee as Appellant had a permanent disqualifier, based on the selection standards set by the Maryland Training Commission. This appeal followed.

APPLICABLE LAW AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action, which states in applicable part,

- (c) **Appeals by applicants.** Any applicant for employment or promotion to a merit system position may appeal decisions of the Chief Administrative Officer with respect to their application for appointment or promotion. Appeals alleging discrimination prohibited by chapter 27,³ "Human Relations and Civil Liberties," of this Code, may be filed in the manner prescribed therein. Appeals alleging that the decisions of the Chief Administrative Officer were arbitrary and capricious, illegal, based on political affiliation, failure to follow announced examination and scoring procedures, or nonmerit factors,

³ Montgomery County Code, Chapter 27, prohibits discrimination on the bases of race, color, religious creed, ancestry, national origin, marital status, age, sex, sexual orientation, disability, genetic status, and family responsibilities.

may be filed directly with the Merit System Protection Board.

Code of Maryland Regulations (COMAR), Title 12, Department of Public Safety and Correctional Services, Subtitle 10 Correctional Training Commission, Chapter 01 General Regulation, which provides in applicable part:

.01 Definitions

- A. In this chapter, the following terms have the meanings indicated.
- B. Terms Defined.
 - (4) “Applicant” means the individual named on the application for certification and for whom the correctional unit is seeking certification.
 - (6) “Certification” means the legal authority under Correctional Services Article, §8-208, Annotated Code of Maryland, conferred by the Commission authorizing an individual to exercise duties related to the investigation, care, custody, control, or supervision of inmates in the custody or under the supervision of a correctional unit after complying with applicable Commission selection and training standards specified in this chapter.
 - (8) “Commission” means the Correctional Training Commission or a representative authorized to act on behalf of the Commission.
 - (23) Mandated Position.
 - (a) “Mandated position” means a job classification required to comply with this chapter.
 - (b) “Mandated position” includes a correctional officer, classification counselor, institutional support staff member, parole and probation agent, monitor, juvenile counselor, youth supervisor, and Juvenile Services support staff.

.24 Prior Substance Abuse by Applicants for Certification.

- A. This regulation:

- (1) Except as provided under §A(2) of this regulation, applies to an applicant; . . .

B. General Policy

- (1) An applicant involved in illegal prior or current use, sale, manufacture, or distribution of a controlled dangerous substance, as specified in this regulation, has manifested character traits, judgment, behavior, or activity which may be considered unacceptable by the Commission for certification in a mandated position.
- (2) The Commission may not approve an appointment or certify an individual in a mandated position if:
 - (a) There is an indication that the individual illegally abused a controlled dangerous substance in excess of the maximum prior use criteria or for circumstances specified in this regulation; . . .

C. Maximum Prior Use Criteria.

- (6) Hallucinogens (including PCP, LSD, and Mescaline and their derivatives). These drugs have no medical use. There is no allowance for prior use of these substances and an applicant who has used these drugs may not be certified by the Commission.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, October 21, 2008, and July 20, 2010), Section 10, *Recruitment and Application Procedures*, which states in applicable part:

6-4. Reference and background investigation requirements; Review of applications.

- (a)
 - (1) The CAO may establish reference and investigation requirements for County positions to verify prior work performance, experience, and job-related personal characteristics of applicants and employees.
 - (2) The CAO must ensure that all reference checks, background investigations, and criminal history records checks of employees and applicants are conducted as required under County, State, and Federal laws or regulations.
- (b) The OHR Director must review and evaluate an application submitted

to determine if the applicant is eligible for the announced vacancy. The OHR Director may disqualify an applicant at any point in the hiring process if:

- (1) the applicant lacks required minimum qualifications such as education, experience, a license, or a certification; . . .

POSITIONS OF THE PARTIES

Appellant:

- The information which disqualified Appellant occurred when Appellant was in high school. This is unfair. Appellant has never been incarcerated, has no record, and has a clean background.
- Appellant has held classified positions requiring clearances and has taught employment readiness workshops in correctional facilities.

County:

- While Appellant denied ever using a hallucinogenic drug on Appellant background questionnaire, Appellant acknowledged during Appellant’s psychological examination that Appellant did experiment with a hallucinogen in high school.
- The County contacted the Maryland Correctional Training Commission about whether the one time use of a hallucinogen by an applicant is an automatic disqualifier for a correctional employee, and the Deputy Director for the Maryland Correctional Training Commission confirmed that any prior usage of a hallucinogenic drug prohibits the certification of an applicant.
- The County is required to follow the employment selection standards established by the Maryland Correctional Training Commission.
- Alternatively, the County had the right to not select Appellant for the position based on the inaccurate statements Appellant provided in the background booklet part of the application process regarding Appellant’s drug use.

ISSUE

Was the County’s decision on Appellant’s application arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors?

ANALYSIS AND CONCLUSIONS

The County has the right to establish the qualifications for a position and conduct background investigations before selecting an applicant for a position. MCPR, 2001, § 6-4(a)(1). In the instant case, the employment selection standards for correctional positions are set by the State of Maryland, and the County must follow these selection standards. COMAR 12.10.01(23).

Significantly, when the County learned through Appellant's own admission that Appellant had experimented, albeit once, with a hallucinogen while in high school, prior to disqualifying Appellant for selection, the County contacted the Maryland Correctional Training Commission to ascertain whether Appellant could be certified. The Deputy Director of the Maryland Correctional Training Commission confirmed that any prior usage of a hallucinogen prohibits certification of an applicant. County Response, Attach. 4. Accordingly, based on the record of evidence before it, the Board finds that the County's decision not to offer Appellant a position in DOCR is not arbitrary, capricious, illegal, or based on any non-merit factor.

ORDER

Based on the above, the Board denies Appellant's appeal from DOCR's determination to discontinue processing Appellant's application for the Correctional Specialist II position.

CASE NO. 11-07

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of Montgomery County's Department of Correction and Rehabilitation (DOCR) to rescind a contingent job offer for the position of Residential Supervisor¹ in the Division of Pre-Release and Reentry Services (Pre-Release Division). The County filed its response (County's Response) to the appeal on December 9, 2010. Appellant was provided the opportunity to file a reply to the County's Response but did not do so.

FINDINGS OF FACT

Appellant has been an intern with the DOCR Pre-Release Division for over a year. See Appeal. Appellant applied for the position of Resident Supervisor in the Pre-Release Division and was given a contingent job offer on September 3, 2010. County's Response, Attachment (Attach.) 1. Appellant was informed that the contingent job offer was extended based upon the information received by the County up to that point in the employment process. Id. Appellant was further told that the offer was contingent based upon Appellant's satisfactory completion of the three phases of the employment process with DOCR: 1) a background criminal history check, completion of a background booklet questionnaire and background interview; 2) a medical examination and drug and alcohol test performed by the

¹ The Board is familiar with the work of a Resident Supervisor. See MSPB Case No. 09-03. Resident Supervisors perform front line correctional work controlling, accounting for, and providing guidance to a segment of an offender-resident population. See Class Specification for Resident Supervisor I available at <http://montgomerycountymd.gov/content/ohr/ResourceLibrary/RetrieveClassTitle1.cfm>.

County's Medical Examiner; and 3) a psychological evaluation. Id. Appellant was informed that only upon successful completion of all three phases of the employment process would Appellant receive a final offer of employment. Id.

As part of the screening process for candidates for the position of Resident Supervisor, Appellant completed the background booklet questionnaire which asked, inter alia, about Appellant's drug experimentation and history. See County's Response, Attach. 2. Appellant acknowledged in response to this drug use questionnaire that Appellant had used marijuana no more than ten times, with the last date of use in 2000, and denied the use of hallucinogens. Id.

Appellant was asked in the background booklet questionnaire whether Appellant had applied to another agency for a position. County's Response, Attach. 3. Appellant listed three agencies – Montgomery County Fire Department, Naval Criminal Investigative Service (NCIS),² and Montgomery County Pre-Release Center. Id. Prior to calling Appellant in for Appellant's background interview, Montgomery County Police Detective A discovered through a computer check that Appellant had applied to the Prince George's County Police in 2006³ and the Metropolitan Police Department in 2006 and 2007.⁴ County's Response at 2, County's Response, Attach. 3. During Appellant's interview with Police Detective A on September 15, 2010, Police Detective A specifically asked Appellant if Appellant had ever

² Appellant claims Appellant is an intern with the Unit of NCIS. See Appeal.

³ Police Detective A subsequently contacted Prince George's County about Appellant. County's Response, Attach. 3. Police Detective A received information from Prince George's County Investigator, Detective C, that Appellant had been removed from their employment process for showing deception on the polygraph machine in the areas of "theft", "narcotics", and "false application". Id. Detective C also indicated that Appellant admitted during Appellant's background investigation for a position in Prince George's County that Appellant used marijuana three times, with the last use in 2001; found marijuana and sold it to Appellant's friends twice; used ecstasy in 2003; and used a stolen credit card to obtain an X-Box in 2002. Id.

⁴ Police Detective A contacted the Metropolitan Police Department about Appellant. County's Response, Attach. 3. Police Detective A received information back from Investigator D of the Metropolitan Police Department. Id. Investigator D indicated Appellant had applied in 2005, 2006, and 2007 for a Police Officer position with their agency. Id. Investigator D also indicated that Appellant had listed in Appellant's background investigation booklet that Appellant had applied to the United States Park Police, Howard County Police, Arlington County Sheriff, Prince George's County Police and Fairfax County Police for positions but been disqualified. Id. The background investigation by the Metropolitan Police Department revealed that Appellant had plagiarized a term paper in college; stolen two CDs while working for UPS; admitted to stealing money from the movie theater Appellant worked for; and stole money from another employer, J&I Delivery Service. Id.

applied to any police departments at any time in the past and Appellant denied having applied to any. Id.

Appellant was also asked about Appellant's drug usage during Appellant's background interview with Police Detective A. County's Response at 2. Appellant repeated that Appellant had used marijuana no more than 10 times with the last incident in 2000. County's Response, Attach. 3. Police Detective A specifically asked Appellant if Appellant had ever tried ecstasy and Appellant denied it. Id. Appellant also denied having ever stolen anything by use of a stolen credit card when asked by Police Detective A. Id. Appellant did acknowledge that Appellant had stolen a pair of weight training gloves.⁵ Id.

Police Detective A conveyed the information Police Detective A had obtained from Appellant and the two local Police Departments to Ms. B, who does human resources for DOCR. County's Response at 2; County's Response, Attach. 3. Ms. B advised Police Detective A to cease the background investigation into Appellant upon learning that Appellant had used ecstasy. Id. The employment selection standards for correctional positions in the State of Maryland are set by the Maryland Police and Correctional Training Commissions (Maryland Correctional Training Commission). See County's Response at 2. The one time use of a hallucinogen constitutes an automatic disqualifier of a candidate for a correctional position. Id. Because DOCR is required to follow the employment selection standards established by the Maryland Correctional Training Commission, DOCR withdrew Appellant's offer of employment as the background investigation had revealed a permanent disqualifier based on Appellant's drug usage. County's Response at 1-2.

This appeal followed.

APPLICABLE LAW AND REGULATIONS

Montgomery County Code, Chapter 33, Personnel and Human Resources, Section 33-9, Equal employment opportunity and affirmative action, which states in applicable part,

- (c) **Appeals by applicants.** Any applicant for employment or promotion to a merit system position may appeal decisions of the Chief Administrative Officer with respect to their application for appointment or promotion. Appeals alleging discrimination prohibited by chapter 27,⁶ "Human Relations and Civil Liberties," of this Code, may be filed in the manner prescribed therein. Appeals alleging that the decisions of the Chief Administrative Officer were arbitrary and capricious, illegal, based on political affiliation, failure to follow

⁵ Appellant denied having stolen anything in the background booklet questionnaire Appellant had completed before the background interview. County's Response, Attach. 3.

⁶ Montgomery County Code, Chapter 27, prohibits discrimination on the bases of race, color, religious creed, ancestry, national origin, marital status, age, sex, sexual orientation, disability, genetic status, and family responsibilities.

announced examination and scoring procedures, or nonmerit factors, may be filed directly with the Merit System Protection Board.

Code of Maryland Regulations (COMAR), Title 12, Department of Public Safety and Correctional Services, Subtitle 10 Correctional Training Commission, Chapter 01 General Regulation, which provides in applicable part:

.01 Definitions

A. In this chapter, the following terms have the meanings indicated.

B. Terms Defined.

- (4) “Applicant” means the individual named on the application for certification and for whom the correctional unit is seeking certification.
- (6) “Certification” means the legal authority under Correctional Services Article, §8-208, Annotated Code of Maryland, conferred by the Commission authorizing an individual to exercise duties related to the investigation, care, custody, control, or supervision of inmates in the custody or under the supervision of a correctional unit after complying with applicable Commission selection and training standards specified in this chapter.
- (8) “Commission” means the Correctional Training Commission or a representative authorized to act on behalf of the Commission.
- (23) Mandated Position.
 - (a) “Mandated position” means a job classification required to comply with this chapter.
 - (b) “Mandated position” includes a correctional officer, classification counselor, institutional support staff member, parole and probation agent, monitor, juvenile counselor, youth supervisor, and Juvenile Services support staff.

.24 Prior Substance Abuse by Applicants for Certification.

A. This regulation:

- (1) Except as provided under §A(2) of this regulation, applies to an applicant; . . .

B. General Policy

- (1) An applicant involved in illegal prior or current use, sale, manufacture, or distribution of a controlled dangerous substance, as specified in this regulation, has manifested character traits, judgment, behavior, or activity which may be considered unacceptable by the Commission for certification in a mandated position.
- (2) The Commission may not approve an appointment or certify an individual in a mandated position if:
 - (a) There is an indication that the individual illegally abused a controlled dangerous substance in excess of the maximum prior use criteria or for circumstances specified in this regulation; . . .

C. Maximum Prior Use Criteria.

- (6) Hallucinogens (including PCP, LSD, and Mescaline and their derivatives). These drugs have no medical use. There is no allowance for prior use of these substances and an applicant who has used these drugs may not be certified by the Commission.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, July 31, 2007, and October 21, 2008), Section 10, *Recruitment and Application Procedures*, which states in applicable part:

6-4. Reference and background investigation requirements; Review of applications.

- (a)
 - (1) The CAO may establish reference and investigation requirements for County positions to verify prior work performance, experience, and job-related personal characteristics of applicants and employees.
 - (2) The CAO must ensure that all reference checks, background investigations, and criminal history records checks of employees and applicants are conducted as required under County, State, and Federal laws or regulations.
- (b) The OHR Director must review and evaluate an application submitted

to determine if the applicant is eligible for the announced vacancy. The OHR Director may disqualify an applicant at any point in the hiring process if:

- (1) the applicant lacks required minimum qualifications such as education, experience, a license, or a certification; . . .

POSITIONS OF THE PARTIES

Appellant:

- Appellant has worked as an intern with the DOCR Pre-Release Division for over a year and is a trusted and valued member of the team. Appellant was encouraged to apply for the Resident Supervisor position when it was posted.
- The Investigator was overly zealous in removing Appellant from the process as Appellant should have been given the opportunity to clarify any issues that may have arisen.
- No one has provided Appellant with the reason for Appellant’s disqualification; Appellant has no criminal background, has a clearance to work with sensitive information for NCIS, and is honest to a fault.

County:

- While Appellant denied ever using a hallucinogenic drug on Appellant’s background questionnaire, Appellant acknowledged during the background investigation conducted by Prince George’s County Police Department that Appellant had used ecstasy in 2003.
- The County is required to follow the employment selection standards established by the Maryland Correctional Training Commission. Under those standards, any prior usage of a hallucinogenic drug prohibits the certification of an applicant.
- The Board, in MSPB Case No. 11-01, upheld the County’s disqualification of an applicant for a position in DOCR based on the applicant’s one time use of a hallucinogen in high school.
- Alternatively, the County had the right to not select Appellant for the position based on the inaccurate statements Appellant provided in the background booklet questionnaire part of the application process regarding Appellant’s drug use and Appellant’s false statements to Police Detective A during the background interview.

ISSUE

Was the County’s decision on Appellant’s application arbitrary and capricious, illegal, or based on political affiliation or other non-merit factors?

ANALYSIS AND CONCLUSIONS

The County has the right to establish the qualifications for a position and conduct background investigations before selecting an applicant for a position. MCPR, 2001, § 6-4(a)(1). In the instant case, the employment selection standards for correctional positions are set by the State of Maryland, and the County must follow these selection standards. COMAR 12.10.01(23).

When the County learned from the Prince George's County Police Detective that Appellant had acknowledged the use of ecstasy, the County ceased the background investigation and disqualified Appellant for selection. This was due to the fact that on a prior occasion, the County had contacted the Maryland Correctional Training Commission to ascertain whether an applicant could be certified if Appellant acknowledged use of a hallucinogen only one time. See MSPB Case No. 11-01. In that case, the Deputy Director of the Maryland Correctional Training Commission had confirmed that any prior usage of a hallucinogen prohibits certification of an applicant. Id.; County's Response at 2-3. The Board finds that the situation in MSPB Case No. 11-01 is identical to the one in the instant case and therefore, based on Appellant's admission that Appellant used a hallucinogen, Appellant could not be certified under the State employment selection standards.⁷

Accordingly, based on the record of evidence before it, the Board finds that the County's decision not to offer Appellant a position in DOCR is not arbitrary, capricious, illegal, or based on any non-merit factor.

ORDER

Based on the above, the Board denies Appellant's appeal from DOCR's determination to discontinue processing Appellant's application for the Resident Supervisor position.

⁷ The County argued in the alternative that Appellant's false statements in the background booklet questionnaire Appellant completed about Appellant's prior drug use, as well as Appellant's false statements to Police Detective A during Appellant's interview, serve as a basis for Appellant's disqualification. The County asserted that honesty and trust are important traits for a correctional position. The Board agrees. As we have repeatedly held, falsification is serious misconduct which affects an individual's reliability, veracity, trustworthiness and fitness for employment. See MSPB Case Nos. 09-03 (2009), 07-13 (2006).

APPEALS PROCESS **GRIEVANCES**

In accordance with Section 34-10(a) of the Montgomery County Personnel Regulations, 2001 (as amended February 15, 2005, and July 21, 2008), an employee with merit status may appeal a grievance decision issued by the Chief Administrative Officer (CAO) to the Board. Section 35-3(a)(3) of the MCPR (as amended February 15, 2005, October 21, 2008, November 3, 2009 and July 27, 2010) specifies that any such appeal must be filed within ten (10) working days of the receipt of the final written decision on the grievance. As with all appeals, the employee need only initially file a notice of intent to appeal.

Upon receipt of the notice of intent, the Board's staff will provide the employee with an Appeal Form which must be completed within 10 working days. Upon receipt of the completed Appeal Form, the Board's staff notifies the Office of the County Attorney and Office of Human Resources of the appeal and provides the County with fifteen (15) working days to respond to the appeal and forward a copy of the decision on the grievance being appealed and all relevant documents. The County must also provide the employee with a copy of all information provided to the Board. After receipt of the County's response, the employee is provided with an opportunity to provide final comments.

After the development of the written record, the Board reviews the record to determine if it is complete. If the Board believes that the record is incomplete or inconsistent, it may require oral testimony to clarify the issues. If the Board determines that no hearing is needed, the Board makes a determination on the written record. The Board issues a written decision on the appeal from the CAO's grievance decision.

During fiscal year 2011, the Board issued the following decisions on appeals concerning grievance decisions.

GRIEVANCE DECISIONS

CASE NO. 11-03

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on the above-captioned appeal concerning the Chief Administrative Officer's (CAO's) determination¹ that the death of Appellant's husband, Mr. X, was not service-connected² under County Code Section 33-46. The County filed a response to the appeal (County's Response) and Appellant filed Final Comments (Appellant's Reply).

FINDINGS OF FACT

Mr. X began his employment with the County as a Firefighter on November 13, 1980. He participated in the Employees' Retirement System (ERS) as a Group G member. Mr. X died on April 17, 2010, as a result of arteriosclerotic cardiovascular disease³ while on a camping trip in West Virginia. See Appellant's Reply, Ex. 3.⁴ Mr. X left two minor sons and a surviving spouse, Appellant.

On August 16, 2010, the CAO sent a letter to Appellant explaining why the CAO did not consider Mr. X's death to be service-related under County Code Section 33-46 so as to entitle Appellant to service-connected death benefits. Specifically, the CAO indicated that although the cause of Mr. X's death was arteriosclerotic cardiovascular disease, his disease was the result of his smoking and not his County service as a Firefighter. The CAO explained that in order to determine if a death is service-related, the County uses as guidance the criteria used to determine a service-connected disability. While acknowledging that Mr.

¹ As set forth infra, Section 33-56 of the Montgomery County Code vests the CAO with the authority to issue interpretations of the County's retirement statute.

² The terms "service-connected" and "service-related" as used in this Final Decision have the same meaning.

³ Mr. X's medical records indicate that Mr. X was a smoker for 29 years. Appellant's Reply, Ex. 4. At the time of his last medical exam on January 14, 2010, Mr. X indicated that although he was still smoking he was in the process of quitting. Id. At the time of his death, Mr. X had Nicorette gum on his person but no cigarettes. Appellant's Reply, Ex. 3.

⁴ This same document was also submitted by the County. However, the County's Reply, although indicating that there were two attachments, failed to label said attachments and provided an additional document not labeled as an attachment. Accordingly, for ease of reference, this Final Decision makes reference to the same documents submitted by the Appellant, which were labeled.

X had completed a tobacco cessation program in 2000, the CAO noted that Mr. X's medical records indicated that he continued to smoke. The CAO concluded that the continued use of tobacco products by Mr. X after completing a tobacco cessation program constituted "willful negligence"⁵ on his part. Appellant, upon learning of the CAO's determination, filed the instant appeal.

APPLICABLE LAWS

Maryland Labor and Employment Code, Title 9, Workers' Compensation, Subtitle 5, Entitlement to and Liability for Compensation, Section 503, Occupational diseases – Presumption – Firefighters, fire fighting instructors, rescue squad members, advanced life support unit members, and police officers, which provides in applicable part:

- (a) Heart disease, hypertension, and lung disease - Firefighters, fire fighting instructors, rescue squad members, and advanced life support unit members.- A paid firefighter, paid fire fighting instructor, or sworn member of the Office of the State Fire Marshal employed by an airport authority, a county, a fire control district, a municipality, or the State or a volunteer firefighter, volunteer fire fighting instructor, volunteer rescue squad member, or volunteer advanced life support unit member who is a covered employee under § 9-234 of this title is presumed to have an occupational disease that was suffered in the line of duty and is compensable under this title if:
 - (1) the individual has heart disease, hypertension, or lung disease;
 - (2) the heart disease, hypertension, or lung disease results in partial or total disability or death; and
 - (3) in the case of a volunteer firefighter, volunteer fire fighting instructor, volunteer rescue squad member, or volunteer advanced life support unit member, the individual has met a suitable standard of physical examination before becoming a firefighter, fire fighting instructor, rescue squad member, or advanced life support unit member.

Montgomery County Code, Chapter 33, Personnel and Human Resources, Article II, Merit System, Section 33-43, Disability retirement, provides in applicable part:

- (a) *Applicability.* This Section applies to an application for disability benefits filed by any member or a medical reevaluation of a disability retiree under subsection (g).

⁵ To be eligible for a service-connected disability pension under the County Code, the beneficiary must provide proof to the CAO that the employee's death resulted from injuries received in the line of duty or directly attributable to the inherent hazards of the duties performed by the employee and was not due to the employee's willful negligence.

- (f) *Service-connected disability retirement.*
 - (4) A Group G member who has an occupational disease that is compensable under Section 9-503 of the Maryland Workers' Compensation Act or who incurs esophageal, lymphatic, testicular, brain, lung, bladder, or kidney cancer, multiple myeloma, melanoma, or any blood borne pathogen, is entitled to receive service-connected disability benefits if:
 - (A) the employee became a member of Group G on or after July 1, 1999, and did not use, or get terminated for using tobacco products for any purpose either on-duty or off-duty while employed by the County as a Group G member; or
 - (B) the employee became a member of Group G before July 1, 1999 and:
 - (i) did not use tobacco products more than 3 times for any purpose while on-duty after June 30, 2000;
 - (ii) if a tobacco user, completed a tobacco-cessation program approved by the County; and
 - (iii) completed a cardiovascular fitness assessment and evaluation program established by the County (or by the County and the certified representative, for members of the Firefighters/Rescuer Bargaining Unit) and made a good faith effort to follow the health and fitness recommendations that resulted from the cardiovascular assessment.

Montgomery County Code, Chapter 33, Personnel and Human Resources, Article II, Merit System, Section 33-46, Death benefits and designation of beneficiaries, provides in applicable part:

- (a) *Beneficiary death benefits of an active member whose death is not service connected.* Upon the death of a member under circumstances not covered by subsection (b), the designated beneficiary must receive a death benefit payment equal to:
 - (1) member contributions, including picked-up contributions, with credited interest, or a spouse's, or domestic partner's, and children's benefit as provided in subsection (e); plus

- (2) 50 percent of average final earnings if the member was a member of the employees' retirement system of the state of Maryland as of August 15, 1965, and became a member of the employees' retirement system of the County on or before December 31, 1966, or such later agency entrance date without a break in service, and who is not on leave without pay except for authorized leave without pay for illness.
- (b) *Spouse's, or domestic partner's, and children's benefits of a member whose death is service connected.* If a member dies while in the service of the County or a participating agency on or after August 15, 1965, and satisfactory proof that death was the result of injuries sustained in the line of duty or was directly attributable to the inherent hazards of the duties performed by the member is submitted and the death was not due to willful negligence, payments must be made as follows:
- (2) The Chief Administrative Officer must pay death benefits to the spouse or domestic partner and child of a Group F or G⁶ member as if the member had been receiving a service-connected disability pension on the date of the member's death and had selected a joint and survivor pension option of 100 percent of the amount payable to the member, if:
 - (A) the Group F or G member died while employed by the County; and
 - (B) the employing department, a beneficiary, or another person submits satisfactory proof to the Chief Administrative Officer that the member's death:
 - (i) resulted from injuries the employee received in the line of duty or was directly attributable to the inherent hazards of the duties the employee performed; and
 - (ii) was not due to the employee's willful negligence.

Montgomery County Code, Chapter 33, Personnel and Human Resources, Article II, Merit System, Section 33-56, Interpretations, which states in applicable part:

- (a) The Chief Administrative Officer is responsible for deciding questions arising under this Article. Any member of the County's retirement system and any retiree or designated beneficiary eligible to receive benefits from the

⁶ The County Code defines Group G as: "Any paid firefighter, paid fire officer, and paid rescue service personnel." Montgomery County Code Section 33-37(f)(6).

retirement system, may request, in writing, a decision on questions arising under this Article from the Chief Administrative Officer, who must respond in writing to such request within 60 days. The response must include a statement of appeal rights.

- (b) The Chief Administrative Officer's decision on a disability application under Section 33- 43 may be appealed under subsection 33-43.
- (c) Any other decision by the Chief Administrative Officer may be appealed within 15 days to the Merit System Protection Board under procedures established by the Board. The decision of the Board is final.

POSITIONS OF THE PARTIES

Appellant:

- Section 33-46 of the County Code provides for service-connected death benefits if the employee’s death is “attributable to the inherent hazards of the duties performed”. However, nowhere in the Code is there a definition for “attributable to the inherent hazards of the duties performed”.
- The County indicates that it looks to another portion of the County Code, Section 33-43, which defines injuries which are eligible for disability benefits. However, the County fails to provide any citation to any authority that it should look to the disability benefits section of the County Code in determining whether a death benefit should be deemed service-connected.
- Mr. X’s cause of death, heart disease, is a presumptively compensable condition for Firefighters under the Maryland Workers’ Compensation Act. There is no justification as to why the County uses the disability benefits definition, which imposes additional requirements for an injury to be compensable than the definition found in the Maryland Workers’ Compensation Act. Indeed, if the County Council wanted to apply the same test for defining disability benefits to the defining of death benefits, it would have written the definition into the County Code; however, it did not do so.
- The County relies on Mr. X’s history of smoking; however, this is not sufficient to overcome the presumption of a compensable disease. The Court of Special Appeals of Maryland upheld judgment for a retired County Firefighter that his coronary artery disease, which caused a heart attack, was, in accordance with the legislative presumption, attributable to his job as a Firefighter, not to his history of smoking.
- Even if one accepts the County’s position that the definition of a compensable condition contained in the County Code’s section on disability benefits applies in the instant case, Mr. X’s beneficiaries are eligible for service-connected benefits. As Mr. X was a Firefighter since 1980, Section 33-43(f)(4)(B) of the Code applies.
- Section 33-43(f)(4)(B) sets up a three-pronged test for receipt of a service-connected disability. Mr. X met all of the criteria of this Section. Specifically, the County failed to offer any proof that Mr. X used tobacco more than 3 times for any purpose while on duty after June 30, 2000; he participated in a tobacco cessation program; and

- he completed a cardiovascular fitness assessment and evaluation program established by the County.
- Mr. X’s death was not due to willful negligence. Mr. X took active steps to curb his smoking and was using both medication and Nicorette gum at the time of his death. He also was using Lipitor to combat his family-related history of high cholesterol.
 - The County’s assertion that somehow Mr. X’s holding of a second job amounts to willful negligence is simply not supportable.

County:

- The Code provides that where an employee’s death was not a result of injuries sustained in the line of duty, proof must be submitted that the death was “attributable to the inherent hazards of the duties performed” by the employee. No proof was submitted by the beneficiaries of Mr. X.
- As no proof was submitted, the County employed as guidance the criteria used to determine a service-connected disability found at Section 33-43 of the Code in order to ascertain if Mr. X’s death was service-related.
- Under Section 33-43, an employee receives a service-connected disability if he has an occupational disease that is compensable under Section 9-503 of the Maryland Workers’ Compensation Act and if he otherwise meets the three-pronged test set forth in the Code.
- While Mr. X died as a result of arteriosclerotic cardiovascular disease, a presumptively compensable disease under the Maryland Workers’ Compensation Act, the presumption is overcome as his disease was the result of his smoking and family history rather than his County service.
- Although Mr. X completed a smoking cessation program in 2000, which is one of the prongs of the statutory test, his medical records indicate he continued to smoke despite completing the program. While it is true that Mr. X tried to quit smoking with the help of prescription medications (e.g., Zyban and Chantix) and was carrying Nicorette gum at the time of his death, his medical records indicate that he was smoking a pack and a half of cigarettes a day.
- His use of tobacco products after completing a tobacco cessation program constituted “willful negligence”.
- Mr. X’s medical records indicate several other factors which can cause a heart attack – e.g., elevated cholesterol and family history of heart disease.
- His medical records also indicate that he worked in the home improvement field and do not provide any evidence that his death was directly attributable to the hazards of firefighting.

ISSUE

Is the Chief Administrative Officer’s determination that Mr. X’s death was not service-connected correct?

ANALYSIS AND CONCLUSIONS

The CAO's Interpretation Of The Retirement Statute Is Not Entitled To Deference.

The County Council has by law vested the CAO with the authority to issue interpretations of the retirement statute. As such, the CAO is entitled to deference with regard to his interpretation, so long as it is reasonable. See, e.g., Martin v. OSHA, 499 U.S. 144, 156 (1991). Where, however, the CAO's interpretation is predicated on an error of law, no deference is appropriate. See Department of Health and Mental Hygiene v. Riverview Nursing Centre, 104 Md. App. 593, 602, 657 A.2d 372, 376 (Md. Ct. Spec. App. 1995).

In the instant case, all parties concede that Mr. X's death was not the result of injuries sustained in the line of duty. County's Response at 2; Appellant's Reply at 3. Therefore, pursuant to the statute, Mr. X's death must be "directly attributable to the inherent hazards of the duties the employee performed." Montgomery County Code, Section 33-46(b)(2)(B)(i). Nowhere in Section 33-46 is this phrase "directly attributable to the inherent hazards of the duties the employee performed" defined.⁷ County's Response at 2; Appellant's Reply at 3.

Accordingly, the CAO has chosen to employ as guidance the criteria used to determine a service-connected disability under Section 33-43 of the Code. County's Response at 2. As Appellant correctly points out, the CAO has provided no citation to any authority for looking to the disability benefits section of the Code when determining whether a death benefit is to be deemed service-connected. Appellant's Reply at 3. We agree completely with Appellant that, had the County Council wanted to apply the same test for defining eligibility for disability benefits to service-connected death benefits, it would have written that definition into the County Code. See, e.g., Federal Trade Commission v. Sun Oil Co., 371 U.S. 505, 515 (1963) (no reason to assume that Congress intended to invoke by omission in § 2 (b) the same broad meaning of competition or competitor which it explicitly provided by inclusion in § 2 (a); the reasonable inference is quite the contrary); City of Burbank v. General Electric Company, 329 F.2d 825, 832 (9th Cir. 1964) (where Congress has carefully employed a term in one part of the statute and excluded it in another, it should not be implied where excluded).

Based on the foregoing analysis, the Board finds that the CAO's reliance on the statutory provision found in Section 33-43 to define disability benefits is misplaced and, to the extent the CAO's interpretation that Mr. X's death is not service-connected relies on this statutory provision, it is not entitled to deference.

The Maryland Workers' Compensation Act employs the phrase "presumed to have an occupational disease suffered in the line of duty" when setting forth the legislative presumption that a Firefighter's heart disease, when it results in death, is covered by the statute. Md. Labor and Employment Code, § 9-503(a). The Board finds that this phrase is analogous to the phrase "directly attributable to the inherent hazards of the duties the

⁷ Nor is there a definition of this phrase under the "Definition" section of the statute found at Section 33-35.

employee performed” for purposes of interpreting the County Code provision governing service-connected death benefits. Thus, based on the fact that Mr. X had heart disease, the Board finds that his death is directly attributable to the inherent hazards of the duties he performed while an employee with the County.

The County has tried unsuccessfully to overcome this presumption by pointing out that there were other factors present in Mr. X’s life that could cause a heart attack – e.g., his elevated cholesterol and strong family history of heart disease. County’s Response at 3. The County also suggests that somehow Mr. X’s working a second job may have contributed to his heart attack. We agree with Appellant that, based upon the Maryland Court of Special Appeals decision in Montgomery County v. Pirrone, 109 Md. App. 201, 674 A.2d 98 (1996), these arguments by the County are unavailing. In Pirrone, the County argued that the appellee, a retired Firefighter who at the time of his heart attack was working two jobs, was not entitled to the presumption that his heart attack was compensable under the Maryland Workers’ Compensation Act,⁸ as it had not been suffered in the line of duty and as a result of his employment. In support of this argument, the County pointed to the fact that the appellee was retired, the appellee had been a smoker for many years (since the age of eighteen) and had high cholesterol. The Court of Special Appeals found that the Appellee was entitled to the presumption of compensability under the statute and the County had failed in its burden of persuading the jury that appellee’s heart attack did not result from an occupational disease.

Mr. X’s Death Was Not Due To Willful Negligence.

Under Section 33-46(b)(2)(B) of the County Code, when an employee’s death is directly attributable to the inherent hazards of the duties the employee performed, then the employee’s beneficiaries are entitled to a service-connected death benefit so long as the employee’s death was not due to the employee’s willful negligence. The County asserts that Mr. X’s continued use of tobacco after completing a tobacco cessation program constituted “willful negligence”. We disagree.

As Appellant points out, the County Code does not define “willful negligence”. Appellant’s Reply at 6. Appellant notes that Black’s Law Dictionary defines it as “a conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages.” Id. We note that the Maryland Court of Special Appeals, in Singer Co., Link Simulation Systems Div. v. Baltimore Gas and Electric Co., 79 Md. App. 461, 479-80, 558 A.2d 419, 428 (1989), concluded that “‘willful neglect’ suggests an intentional, conscious, or known negligence – a

⁸ Although the appellee’s claim in Pirrone was based on Article 101, § 64(a) of Maryland’s Workers’ Compensation Law, the court noted that this provision had been recodified as Md. Code Labor and Employment § 9-503 (1991, 1995 Supp.). 109 Md. App. at 207 n.1, 674 A.2d 101 n.1.

knowing disregard of a plain or manifest duty.”⁹ Based on this definition, it is clear from the record of evidence that Mr. X’s death was not due to his willful negligence.

It is clear also from the record of evidence that Mr. X, who had smoked for twenty-nine years, was addicted to nicotine. Appellant’s Reply at 7. Had Mr. X taken no steps to deal with his addiction after completing the County’s tobacco cessation program in 2000,¹⁰ the Board would agree with the County that Mr. X could be accused of willful negligence, but that was not the case. The record of evidence indicates that Mr. X had actively tried to quit smoking for at least ten years prior to his death. Appellant’s Reply, Ex. 2 ¶ 2. At the time of his death, as even the County acknowledges, he was using Nicorette gum and taking Chantix medication to attempt to quit smoking. Id. ¶ 3; County’s Response at 3. Therefore, based on the record of evidence before the Board, it concludes that Mr. X’s death was not due to willful negligence.

Accordingly, based on the foregoing analysis, the Board finds that Mr. X’s death is directly attributable to the inherent hazards of the duties he performed as a Firefighter and was not due to willful negligence on his part. Therefore, his beneficiaries are entitled to service-connected death benefits.

Even Assuming, Arguendo, The County Was Correct In Applying The Criteria Used To Determine A Service-Connected Disability Under Section 33-43, It Still Incorrectly Found Mr. X’s Death Was Not Service-Connected.

Assuming, arguendo, that the County was correct in applying the criteria used to determine a service-connected disability under Section 33-43 of the Code to determine whether a death is service-connected, the County erred in its finding that Mr. X’s death was not service-connected. Under Section 33-43, a Group G member is deemed to have a service-connected disability if he has an occupational disease that is compensable under Section 9-503 of the Maryland Workers’ Compensation Act. As previously noted, Mr. X, as a Firefighter, is presumed to have an occupational disease that was suffered in the line of duty because he had heart disease.

Section 33-43 goes on to impose certain additional criteria that must be met if a Group G employee has an otherwise compensable occupational disease. Specifically, where the employee, such as Mr. X, was a member of Group G before July 1, 1999, the employee must: 1) not have used tobacco products more than 3 times for any purpose while on-duty after June 30, 2000; 2) if a tobacco user, have completed a tobacco-cessation program approved by the County; and 3) have completed a cardiovascular fitness assessment and evaluation program established by the County and made a good faith effort to follow the health and fitness recommendations that resulted from the cardiovascular assessment. As

⁹ The Court of Special Appeals cited to Black’s Law Dictionary in arriving at its definition of willful neglect. 79 Md. App. at 479, 480, 558 A.2d at 427.

¹⁰ The County acknowledges that Mr. X completed a tobacco cessation program in 2000. County’s Response at 3.

Appellant correctly points out, the County has not offered any evidence that Mr. X used tobacco products more than 3 times while on duty after June 30, 2000. Appellant's Reply at 5. Both parties agree that Mr. X completed a tobacco cessation program in 2000. Id.; County's Response at 3. Moreover, Mr. X had a cardiovascular fitness assessment done by the County on September 24, 2007 and was informed by the doctor that the finding would not conflict with Mr. X's duties "in the near future". Appellant's Reply, Ex. 1. The County's doctor made no health recommendations as a result of the cardiovascular assessment; he instead urged that Mr. X consult with his own physician. Id. It is clear that Mr. X followed this recommendation, as he was taking Lipitor to reduce his cholesterol and using Chantix and Nicorette gum to quit smoking. Appellant's Reply, Ex. 2 ¶¶ 3, 5. Thus, the Board finds that Mr. X met the additional criteria set forth in Section 33-43 and his death is service-connected.

ORDER

Based on the foregoing, the Board sustains Appellant's appeal from the CAO's determination that Mr. X's death was not service-connected. Accordingly, the Board orders that the County provide the Appellant with service-connected death benefits pursuant to Section 33-46(b)(2) of the County Code.

CASE NO. 11-04

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on the above-captioned appeal concerning the Chief Administrative Officer's (CAO's) determination¹ that the death of Appellant's children's father, Mr. X, was not considered service-connected² under County Code Section 33-46. The County filed a response to the appeal (County's Response) and Appellant filed Final Comments (Appellant's Reply).

FINDINGS OF FACT

Mr. X began his employment with the County as a Firefighter on November 13, 1980. He participated in the Employees' Retirement System (ERS) as a Group G member. Mr. X died on April 17, 2010, as a result of arteriosclerotic cardiovascular disease³ while on a

¹ As set forth infra, Section 33-56 of the Montgomery County Code vests the CAO with the authority to issue interpretations of the County's retirement statute.

² The terms "service-connected" and "service-related" as used in this Final Decision have the same meaning.

³ Mr. X's medical records indicate that Mr. X was a smoker for 29 years. Appellant's Reply, Ex. 4. At the time of his last medical exam on January 14, 2010, Mr. X indicated that although he was still smoking he was in the process of quitting. Id. At the

camping trip in West Virginia. See Appellant’s Reply, Ex. 3.⁴ Mr. X left two minor children, and a surviving spouse.

On August 16, 2010, the CAO sent a letter to Appellant explaining why the CAO did not consider Mr. X’s death to be service-related under County Code Section 33-46 so as to entitle Mr. X’s minor children to death benefits. Specifically, the CAO indicated that although the cause of Mr. X’s death was arteriosclerotic cardiovascular disease, his disease was the result of his smoking and not his County service as a Firefighter. The CAO explained that in order to determine if a death is service-related, the County uses as guidance the criteria used to determine a service-connected disability. While acknowledging that Mr. X had completed a tobacco cessation program in 2000, the CAO noted that Mr. X’s medical records indicated that he continued to smoke. The CAO concluded that the continued use of tobacco products by Mr. X after completing a tobacco cessation program constituted “willful negligence”⁵ on his part. Appellant, upon learning of the CAO’s determination, filed the instant appeal on behalf of her and Mr. X’s minor children.

APPLICABLE LAWS

Maryland Labor and Employment Code, Title 9, Workers’ Compensation, Subtitle 5, Entitlement to and Liability for Compensation, Section 503, Occupational diseases – Presumption – Firefighters, fire fighting instructors, rescue squad members, advanced life support unit members, and police officers, which provides in applicable part:

- (a) Heart disease, hypertension, and lung disease - Firefighters, fire fighting instructors, rescue squad members, and advanced life support unit members.- A paid firefighter, paid fire fighting instructor, or sworn member of the Office of the State Fire Marshal employed by an airport authority, a county, a fire control district, a municipality, or the State or a volunteer firefighter, volunteer fire fighting instructor, volunteer rescue squad member, or volunteer advanced life support unit member who is a covered employee under § 9-234

time of his death, Mr. X had Nicorette gum on his person but no cigarettes. Appellant’s Reply, Ex. 3.

⁴ This same document was also submitted by the County. However, the County’s Reply, although indicating that there were two attachments, failed to label said attachments and provided an additional document not labeled as an attachment. Accordingly, for ease of reference, this Final Decision references the same documents submitted by the Appellant, which were labeled.

⁵ To be eligible for a service-connected disability pension under the County Code, the beneficiary must provide proof to the CAO that the employee’s death resulted from injuries received in the line of duty or directly attributable to the inherent hazards of the duties performed by the employee and was not due to the employee’s willful negligence.

of this title is presumed to have an occupational disease that was suffered in the line of duty and is compensable under this title if:

- (1) the individual has heart disease, hypertension, or lung disease;
- (2) the heart disease, hypertension, or lung disease results in partial or total disability or death; and
- (3) in the case of a volunteer firefighter, volunteer fire fighting instructor, volunteer rescue squad member, or volunteer advanced life support unit member, the individual has met a suitable standard of physical examination before becoming a firefighter, fire fighting instructor, rescue squad member, or advanced life support unit member.

Montgomery County Code, Chapter 33, Personnel and Human Resources, Article II, Merit System, Section 33-43, Disability retirement, provides in applicable part:

- (a) *Applicability.* This Section applies to an application for disability benefits filed by any member or a medical reevaluation of a disability retiree under subsection (g).
- (f) *Service-connected disability retirement.*
 - (4) A Group G member who has an occupational disease that is compensable under Section 9-503 of the Maryland Workers' Compensation Act or who incurs esophageal, lymphatic, testicular, brain, lung, bladder, or kidney cancer, multiple myeloma, melanoma, or any blood borne pathogen, is entitled to receive service-connected disability benefits if:
 - (A) the employee became a member of Group G on or after July 1, 1999, and did not use, or get terminated for using tobacco products for any purpose either on-duty or off-duty while employed by the County as a Group G member; or
 - (B) the employee became a member of Group G before July 1, 1999 and:
 - (i) did not use tobacco products more than 3 times for any purpose while on-duty after June 30, 2000;
 - (ii) if a tobacco user, completed a tobacco-cessation program approved by the County; and
 - (iii) completed a cardiovascular fitness assessment

and evaluation program established by the County (or by the County and the certified representative, for members of the Firefighters/Rescuer Bargaining Unit) and made a good faith effort to follow the health and fitness recommendations that resulted from the cardiovascular assessment.

Montgomery County Code, Chapter 33, Personnel and Human Resources, Article II, Merit System, Section 33-46, Death benefits and designation of beneficiaries, provides in applicable part:

- (a) *Beneficiary death benefits of an active member whose death is not service connected.* Upon the death of a member under circumstances not covered by subsection (b), the designated beneficiary must receive a death benefit payment equal to:
 - (1) member contributions, including picked-up contributions, with credited interest, or a spouse's, or domestic partner's, and children's benefit as provided in subsection (e); plus
 - (2) 50 percent of average final earnings if the member was a member of the employees' retirement system of the state of Maryland as of August 15, 1965, and became a member of the employees' retirement system of the County on or before December 31, 1966, or such later agency entrance date without a break in service, and who is not on leave without pay except for authorized leave without pay for illness.
- (b) *Spouse's, or domestic partner's, and children's benefits of a member whose death is service connected.* If a member dies while in the service of the County or a participating agency on or after August 15, 1965, and satisfactory proof that death was the result of injuries sustained in the line of duty or was directly attributable to the inherent hazards of the duties performed by the member is submitted and the death was not due to willful negligence, payments must be made as follows:
 - (2) The Chief Administrative Officer must pay death benefits to the spouse or domestic partner and child of a Group F or G⁶ member as if the member had been receiving a service-connected disability pension on the date of the member's death and had selected a joint and survivor pension option of 100 percent of the amount payable to the member, if:

⁶ The County Code defines Group G as: "Any paid firefighter, paid fire officer, and paid rescue service personnel." Montgomery County Code Section 33-37(f)(6).

- (A) the Group F or G member died while employed by the County; and
- (B) the employing department, a beneficiary, or another person submits satisfactory proof to the Chief Administrative Officer that the member's death:
 - (i) resulted from injuries the employee received in the line of duty or was directly attributable to the inherent hazards of the duties the employee performed; and
 - (ii) was not due to the employee's willful negligence.

Montgomery County Code, Chapter 33, Personnel and Human Resources, Article II, Merit System, Section 33-56, Interpretations, which states in applicable part:

- (a) The Chief Administrative Officer is responsible for deciding questions arising under this Article. Any member of the County's retirement system and any retiree or designated beneficiary eligible to receive benefits from the retirement system, may request, in writing, a decision on questions arising under this Article from the Chief Administrative Officer, who must respond in writing to such request within 60 days. The response must include a statement of appeal rights.
- (b) The Chief Administrative Officer's decision on a disability application under Section 33- 43 may be appealed under subsection 33-43.
- (c) Any other decision by the Chief Administrative Officer may be appealed within 15 days to the Merit System Protection Board under procedures established by the Board. The decision of the Board is final.

POSITIONS OF THE PARTIES

Appellant:

- Section 33-46 of the County Code provides for service-connected death benefits if the employee's death is "attributable to the inherent hazards of the duties performed". However, nowhere in the Code is there a definition for "attributable to the inherent hazards of the duties performed".
- The County indicates that it looks to another portion of the County Code, Section 33-43, which defines injuries which are eligible for disability benefits. However, the County fails to provide any citation to any authority that it should look to the disability benefits section of the County Code in determining whether a death benefit should be deemed service-connected.

- Mr. X’s cause of death, heart disease, is a presumptively compensable condition for Firefighters under the Maryland Workers’ Compensation Act. There is no justification as to why the County uses the disability benefits definition, which imposes additional requirements for an injury to be compensable than the definition found in the Maryland Workers’ Compensation Act. Indeed, if the County Council wanted to apply the same test for defining disability benefits to the defining of death benefits, it would have written the definition into the County Code; however, it did not do so.
- The County relies on Mr. X’s history of smoking; however, this is not sufficient to overcome the presumption of a compensable disease. The Court of Special Appeals of Maryland upheld judgment for a retired County Firefighter that his coronary artery disease, which caused a heart attack, was, in accordance with the legislative presumption, attributable to his job as a Firefighter, not to his history of smoking.
- Even if one accepts the County’s position that the definition of a compensable condition contained in the County Code’s section on disability benefits applies in the instant case, Mr. X’s beneficiaries are eligible for service-connected benefits. As Mr. X was a Firefighter since 1980, Section 33-43(f)(4)(B) of the Code applies.
- Section 33-43(f)(4)(B) sets up a three-pronged test for receipt of a service-connected disability. Mr. X met all of the criteria of this Section. Specifically, the County failed to offer any proof that Mr. X used tobacco more than 3 times for any purpose while on duty after June 30, 2000; he participated in a tobacco cessation program; and he completed a cardiovascular fitness assessment and evaluation program established by the County.
- Mr. X’s death was not due to willful negligence. Mr. X took active steps to curb his smoking and was using both medication and Nicorette gum at the time of his death. He also was using Lipitor to combat his family-related history of high cholesterol.
- The County’s assertion that somehow Mr. X’s holding of a second job amounts to willful negligence is simply not supportable.

County:

- The Code provides that where an employee’s death was not a result of injuries sustained in the line of duty, proof must be submitted that the death was “attributable to the inherent hazards of the duties performed” by the employee. No proof was submitted by the beneficiaries of Mr. X.
- As no proof was submitted, the County employed as guidance the criteria used to determine a service-connected disability found at Section 33-43 of the Code in order to ascertain if Mr. X’s death was service-related.
- Under Section 33-43, an employee receives a service-connected disability if he has an occupational disease that is compensable under Section 9-503 of the Maryland Workers’ Compensation Act and if he otherwise meets the three-pronged test set forth in the Code.
- While Mr. X died as a result of arteriosclerotic cardiovascular disease, a presumptively compensable disease under the Maryland Workers’ Compensation Act, the presumption is overcome as his disease was the result of his smoking and family history rather than his County service.

- Although Mr. X completed a smoking cessation program in 2000, which is one of the prongs of the statutory test, his medical records indicate he continued to smoke despite completing the program. While it is true that Mr. X tried to quit smoking with the help of prescription medications (e.g., Zyban and Chantix) and was carrying Nicorette gum at the time of his death, his medical records indicate that he was smoking a pack and a half of cigarettes a day.
- His use of tobacco products after completing a tobacco cessation program constituted “willful negligence”.
- Mr. X’s medical records indicate several other factors which can cause a heart attack – e.g., elevated cholesterol and family history of heart disease.
- His medical records also indicate that he worked in the home improvement field and do not provide any evidence that his death was directly attributable to the hazards of firefighting.

ISSUE

Is the Chief Administrative Officer’s determination that Mr. X’s death was not service-connected correct?

ANALYSIS AND CONCLUSIONS

The CAO’s Interpretation Of The Retirement Statute Is Not Entitled To Deference.

The County Council has by law vested the CAO with the authority to issue interpretations of the retirement statute. As such, the CAO is entitled to deference with regard to his interpretation, so long as it is reasonable See, e.g., Martin v. OSHA, 499 U.S. 144, 156 (1991). Where, however, the CAO’s interpretation is predicated on an error of law, no deference is appropriate. See Department of Health and Mental Hygiene v. Riverview Nursing Centre, 104 Md. App. 593, 602, 657 A.2d 372, 376 (Md. Ct. Spec. App. 1995).

In the instant case, all parties concede that Mr. X’s death was not the result of injuries sustained in the line of duty. County’s Response at 2; Appellant’s Reply at 3. Therefore, pursuant to the statute, Mr. X’s death must be “directly attributable to the inherent hazards of the duties the employee performed.” Montgomery County Code, Section 33-46(b)(2)(B)(i). Nowhere in Section 33-46 is this phrase “directly attributable to the inherent hazards of the duties the employee performed” defined.⁷ County’s Response at 2; Appellant’s Reply at 3.

Accordingly, the CAO has chosen to employ as guidance the criteria used to determine a service-connected disability under Section 33-43 of the Code. County’s Response at 2. As Appellant correctly points out, the CAO has provided no citation to any authority for looking to the disability benefits section of the Code when determining whether a death benefit is to be deemed service-connected. Appellant’s Reply at 3. We agree completely with Appellant that, had the County Council wanted to apply the same test for

⁷ Nor is there a definition of this phrase under the “Definition” section of the statute found at Section 33-35.

defining eligibility for disability benefits to service-connected death benefits, it would have written that definition into the County Code. See, e.g., Federal Trade Commission v. Sun Oil Co., 371 U.S. 505, 515 (1963) (no reason to assume that Congress intended to invoke by omission in § 2 (b) the same broad meaning of competition or competitor which it explicitly provided by inclusion in § 2 (a); the reasonable inference is quite the contrary); City of Burbank v. General Electric Company, 329 F.2d 825, 832 (9th Cir. 1964) (where Congress has carefully employed a term in one part of the statute and excluded it in another, it should not be implied where excluded).

Based on the foregoing analysis, the Board finds that the CAO's reliance on the statutory provision found in Section 33-43 to define disability benefits is misplaced and, to the extent the CAO's interpretation that Mr. X's death is not service-connected relies on this statutory provision, it is not entitled to deference.

The Maryland Workers' Compensation Act employs the phrase "presumed to have an occupational disease suffered in the line of duty" when setting forth the legislative presumption that a Firefighter's heart disease, when it results in death, is covered by the statute. Md. Labor and Employment Code, § 9-503(a). The Board finds that this phrase is analogous to the phrase "directly attributable to the inherent hazards of the duties the employee performed" for purposes of interpreting the County Code provision governing service-connected death benefits. Thus, based on the fact that Mr. X had heart disease, the Board finds that his death is directly attributable to the inherent hazards of the duties he performed while an employee with the County.

The County has tried unsuccessfully to overcome this presumption by pointing out that there were other factors present in Mr. X's life that could cause a heart attack – e.g., his elevated cholesterol and strong family history of heart disease. County Response at 3. The County also suggests that somehow Mr. X's working a second job may have contributed to his heart attack. We agree with Appellant that, based upon the Maryland Court of Special Appeals decision in Montgomery County v. Pirrone, 109 Md. App. 201, 674 A.2d 98 (1996), these arguments by the County are unavailing. In Pirrone, the County argued that the appellee, a retired Firefighter who at the time of his heart attack was working two jobs, was not entitled to the presumption that his heart attack was compensable under the Maryland Workers' Compensation Act,⁸ as it had not been suffered in the line of duty and as a result of his employment. In support of this argument, the County pointed to the fact that the appellee was retired, the appellee had been a smoker for many years (since the age of eighteen) and had high cholesterol. The Court of Special Appeals found that the Appellee was entitled to the presumption of compensability under the statute and the County had failed in its burden of persuading the jury that appellee's heart attack did not result from an occupational disease.

⁸ Although the appellee's claim in Pirrone was based on Article 101, § 64(a) of Maryland's Workers' Compensation Law, the court noted that this provision had been recodified as Md. Code Labor and Employment § 9-503 (1991, 1995 Supp.). 109 Md. App. at 207 n.1, 674 A.2d 101 n.1.

Mr. X's Death Was Not Due To Willful Negligence.

Under Section 33-46(b)(2)(B) of the County Code, when an employee's death is directly attributable to the inherent hazards of the duties the employee performed, then the employee's beneficiaries are entitled to a service-connected death benefit so long as the employee's death was not due to the employee's willful negligence. The County asserts that Mr. X's continued use of tobacco after completing a tobacco cessation program constituted "willful negligence". We disagree.

As Appellant points out, the County Code does not define "willful negligence". Appellant's Reply at 6. Appellant notes that Black's Law Dictionary defines it as "a conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages." *Id.* We note that the Maryland Court of Special Appeals, in Singer Co., Link Simulation Systems Div. v. Baltimore Gas and Electric Co., 79 Md. App. 461, 479-480, 558 A.2d 419, 428 (1989), concluded that "'willful neglect' suggests an intentional, conscious, or known negligence – a knowing disregard of a plain or manifest duty."⁹ Based on this definition, it is clear from the record of evidence that Mr. X's death was not due to his willful negligence.

It is evident from the record of evidence that Mr. X, who had smoked for twenty-nine years, was addicted to nicotine. Appellant's Reply at 7. Had Mr. X taken no steps to deal with Mr. X's addiction after completing the County's tobacco cessation program in 2000,¹⁰ the Board would agree with the County that Mr. X could be accused of willful negligence, but that was not the case. The record of evidence indicates that Mr. X had actively tried to quit smoking for at least ten years prior to his death. Appellant's Reply, Ex. 1 ¶ 2. At the time of his death, as even the County acknowledges, he was using Nicorette gum and taking Chantix medication to attempt to quit smoking. *Id.* ¶ 3; County's Response at 3.

Accordingly, based on the foregoing analysis, the Board finds that Mr. X's death is directly attributable to the inherent hazards of the duties he performed as a Firefighter and was not due to willful negligence on his part. Accordingly, his beneficiaries are entitled to service-connected death benefits.

Even Assuming, Arguendo, The County Was Correct In Applying The Criteria Used To Determine A Service-Connected Disability Under Section 33-43, It Still Incorrectly Found Mr. X's Death Was Not Service-Connected.

Assuming, arguendo, that the County was correct in applying the criteria used to determine a service-connected disability under Section 33-43 of the Code to determine whether a death is service-connected, the County erred in its finding that Mr. X's death was

⁹ The Court of Special Appeals cited to Black's Law Dictionary in arriving at its definition of willful neglect. 79 Md. App. at 479, 480, 558 A.2d at 427.

¹⁰ The County acknowledges that Mr. X completed a tobacco cessation program in 2000. County's Response at 3.

not service-connected. Under Section 33-43, a Group G member is deemed to have a service-connected disability if he has an occupational disease that is compensable under Section 9-503 of the Maryland Workers' Compensation Act. As previously noted, Mr. X, as a Firefighter, is presumed to have an occupational disease that was suffered in the line of duty because he had heart disease.

Section 33-43 goes on to impose certain additional criteria that must be met if a Group G employee has an otherwise compensable occupational disease. Specifically, where the employee, such as Mr. X, was a member of Group G before July 1, 1999, the employee must: 1) not have used tobacco products more than 3 times for any purpose while on-duty after June 30, 2000; 2) if a tobacco user, have completed a tobacco-cessation program approved by the County; and 3) have completed a cardiovascular fitness assessment and evaluation program established by the County and made a good faith effort to follow the health and fitness recommendations that resulted from the cardiovascular assessment. As Appellant correctly points out, the County has not offered any evidence that Mr. X used tobacco products more than 3 times while on duty after June 30, 2000. Appellant's Reply at 5. Both parties agree that Mr. X completed a tobacco cessation program in 2000. *Id.*; County's Response at 3. Moreover, Mr. X had a cardiovascular fitness assessment done by the County on September 24, 2007 and was informed by the doctor that the finding would not conflict with Mr. X's duties "in the near future". Appellant's Reply, Ex. 1. The County's doctor made no health recommendations as a result of the cardiovascular assessment; he instead urged that Mr. X consult with his own physician. *Id.* It is clear that Mr. X followed this recommendation, as he was taking Lipitor to reduce his cholesterol and using Chantix and Nicorette gum to quit smoking. Appellant's Reply, Ex. 2 ¶¶ 3, 5. Thus, the Board finds that Mr. X met the additional criteria set forth in Section 33-43 and his death is service-connected.

ORDER

Based on the foregoing, the Board sustains Appellant's appeal from the CAO's determination that Mr. X's death was not service-connected. Accordingly, the Board orders that the County provide the Appellant's minor children with service-connected death benefits pursuant to Section 33-46(b)(2) of the County Code.

CASE NO. 11-06

FINAL DECISION AND ORDER

This is the final decision of the Montgomery County Merit System Protection Board (Board) on Appellant's appeal from the determination of the Montgomery County, Maryland, Chief Administrative Officer (CAO) that an administrative error was made with regard to Appellant's placement in the Employees' Retirement System (ERS) in 1997, rather than the Retirement Savings Plan (RSP), and that this error needed to be corrected.¹

FINDINGS OF FACT

Appellant was employed by the County from February 8, 1987 until September 30, 1995. Appeal, Letter from Appellant to the CAO, dated 09/08/10, at 1 (hereinafter Attachment (Attach.)1). During that time, Appellant was a member of the ERS. *Id.* Appellant resigned from employment with the County on September 30, 1995. *Id.* After Appellant's resignation, the Office of Human Resources (OHR) sent Appellant a letter, indicating that as Appellant had at least five years of credited service in the ERS, Appellant had to make an election with regard to the funds Appellant had contributed to the ERS system. County's Response, Exhibit E.² Appellant elected to withdraw Appellant's contributions. *Id.*

On May 27, 1997, Appellant returned to County employment. County's Response, Ex. F; Appeal, Attach. 1 at 1. Appellant remembers that during the new employee orientation session Appellant attended that Appellant was informed that Appellant would have to sign up for the new retirement system. Appeal, Attach. 1 at 1; *see also* County's Response, Ex. F. Appellant completed the paperwork for the RSP. *Id.* However, Appellant was never placed in the RSP; instead, Appellant was put back into the ERP. Appeal, Attach.

¹ The ERS is a defined benefit plan which pays a retiree a set monthly amount from retirement to death. The RSP is a defined contribution plan, where both the employee and the County contribute a set percentage of the employee's salary into a retirement account, which changes its value over time as a result of investment returns (or losses). Upon retirement, the employee's benefit is the total of the employee and employer's contributions and any investment income earned on the joint contributions. *See* Office of Legislative Oversight Report 2011-2, *Achieving a Structurally Balanced Budget in Montgomery County, Part II: Options for Long-Term Fiscal Balance* at B-2 to B-3 (2010) available at <http://www.montgomerycountymd.gov/cs/ltmpl.asp?url=/Content/council/olo/reports/2008.asp>.

² Once again the County included several documents as attachments to its Response but failed to label them. For ease of reference, the Board has labeled the documents thusly: Letter from the CAO to Appellant, dated 10/27/10, Exhibit (Ex.) A; Expedited Bill No. 33-3, effective 12/01/03, Ex. B; Bill No. 11-8, effective 01/01/09 and 07/01/09, Ex. C; Montgomery County Code, Sections 33-37, 33-53, 33-61C, 33-61J, 33-115, and 33-127, Ex. D; Letter from Ms. C to Appellant, dated 10/10/95, Ex. E; and Montgomery County Retirement Savings Plan Participant Information, dated 05/27/97, Ex. F.

1 at 1; County's Response at 2.

On July 21, 2010, Appellant contacted Mr. B in OHR about obtaining retirement benefit calculations. Appeal, Email from Mr. B to Appellant, dated 07/27/10 (hereinafter Attach. 2). Specifically, Appellant requested that OHR provide Appellant with figures for Appellant's retirement benefit if Appellant retired on an early out in 2011 and figures if Appellant retired in 2012. Id. Appellant also noted that Appellant had left the County from September 1995 until May 1997 and taken out eight and one half years of retirement contributions, so Appellant did not know how to obtain correct retirement calculations. Id.

Mr. B responded to Appellant, informing Appellant that Appellant was incorrectly placed in the ERS system when Appellant returned to County Government employment. Id. Mr. B informed Appellant that OHR was going to correct the administrative error. Id. He explained that Finance was calculating what Appellant had paid into ERS and what should have been paid into RSP, and Appellant would be refunded the difference. Id. Appellant was also informed that the Board of Investment Trustees would set up an account with Fidelity and would credit Appellant's account with the missed employee and employer contributions using the highest earning mutual fund for calculating the investment return. Id.

Appellant appealed to the CAO to place Appellant back in the ERS. Appeal, Attach. 1. The CAO responded to Appellant, informing Appellant that under the terms of the ERS, because Appellant received back Appellant's contributions to the ERS when Appellant left County employment in 1995, Appellant was not eligible to participate in the ERS when Appellant returned to County Government in 1997. County's Response, Ex. A.

This appeal followed.

POSITIONS OF THE PARTIES

Appellant:

- Appellant was never informed about vesting Appellant's retirement contributions when Appellant left County employment in 1995.
- Appellant vaguely remembers completing the forms at orientation to enter the RSP. However, through no fault of Appellant's, Appellant was not placed in that system but instead into the ERS.
- For the past thirteen and a half years, Appellant has been in the ERS system and has received information from OHR about Appellant's yearly contributions and believed everything was on track for Appellant to retire when Appellant was eligible. Appellant's whole life has been turned upside down because of this error and Appellant is going to lose quite a bit of money from Appellant's retirement.
- Had Appellant known Appellant was in a different retirement system from the one Appellant was contributing to, Appellant might have made different investments. Appellant has been wronged by an error that was committed by OHR and should be permitted to stay in ERS.

County:

- When Appellant left County employment, Appellant was notified of Appellant's right to vest Appellant's retirement benefits and receive future benefits from the ERS or receive an immediate distribution. Appellant signed a distribution form requesting the return of Appellant's employee contributions, and Appellant's signature on the distribution form acknowledged Appellant's understanding that Appellant was giving up any future benefits from the ERS.
- Based on the statute governing ERS, when Appellant returned to County employment, Appellant was no longer eligible to participate in the ERS because Appellant had received a distribution of Appellant's employee contributions to ERS.
- Appellant was notified during new employee orientation in 1997 that Appellant would have to participate in RSP. Appellant completed a Participant Information Form for the RSP.
- The County Code provides that if an error in a retirement record occurs that results in an employee receiving more or less than entitled to receive had the record been correct, the error must be corrected.
- Equitable estoppel does not apply in this case, as Appellant has not changed Appellant's position based on the mistake made, and there is no ambiguity in the law regarding which retirement system Appellant should have been placed in when Appellant returned to County employment.

APPLICABLE LAW

Montgomery County Code, Section 33-37(e), *Retirement Plans*, which states in applicable part:

- (2) An employee enrolled or re-enrolled on or after July 1, 1978, and before October 1, 1994, is a member of the integrated retirement plan unless the employee becomes a member of the Retirement Savings Plan through transfer or election. An employee enrolled before July 1, 1978, may be a member of the optional retirement plan, the integrated retirement plan, or the Retirement Savings Plan. A member's decision to transfer from the optional retirement plan or the integrated retirement plan is irrevocable. A former County employee who returns to County service is a member of the plan in which the employee was enrolled when the employee left County service if the employee:
 - (A) was vested under Section 33-45 when the employee left County service;
 - (B) left all member contributions plus credited interest in the fund;
 - (C) returned to County service within 25 months; and

(D) did not transfer to the Retirement Savings Plan.

Montgomery County Code, Section 33-53, *Protection against fraud*, which states in applicable part:

Any person who shall knowingly make any false statement or shall falsify or permit to be falsified any record or records of this retirement system in any attempt to defraud such system as a result of such act, shall be charged with a misdemeanor, and may be punishable under the laws of the county and the state. Should any change or error in the records result in any member or beneficiary receiving from the retirement system more or less than entitled to receive had the records been correct, the error shall be corrected and as far as practicable the payment shall be adjusted in such manner that the actuarial equivalent of the benefit to which such member or beneficiary was correctly entitled will be paid. Any member or beneficiary who has received payment from the retirement system of any monies to which not entitled under the provisions of this act, shall be required to refund such monies to the system.

Montgomery County Code, Section 33-115(b), *Participant groups and eligibility*, which stated³ in applicable part:

- (1) Group I. Except as provided in the last sentence of Section 33-37(e)(2), any full-time or career part-time employee must participate in the retirement savings plan if the employee begins, or returns to, County service on or after October 1, 1994; and
 - (A)
 - (i) is not represented by an employee organization;
 - (ii) does not occupy a bargaining unit position; and
 - (iii) is not a public safety employee; or
 - (B)
 - (i) is not a public safety employee;
 - (ii) is subject to the terms of a collective bargaining agreement between the County and an employee organization which requires the employee to participate in the retirement savings plan.

³ The section quoted is the statutory language in effect at the time Appellant was rehired.

ISSUE

Is the County's determination to place Appellant in the RSP in accordance with applicable law?

ANALYSIS AND CONCLUSIONS

The County Code is clear that an employee who returns to County service after October 1, 1994 must participate in the RSP. The only exception to this requirement is where an employee who left County service returned within twenty-five months, was vested under the ERS system when the employee left County service, and left all member contributions plus credited interest in the ERS. While Appellant was vested in the ERS system at the time Appellant left County service in 1995 and returned to County service within twenty months thereafter, Appellant did not leave Appellant's contributions in the ERS. Rather, Appellant withdrew them. County's Response, Ex. E. Therefore, pursuant to the statute, Appellant had to be placed in the RSP upon Appellant's return to County service.

Appellant conceded that Appellant was made aware of this fact during the new employee orientation Appellant attended in 1997. Appellant also acknowledged that Appellant filled out forms to participate in the RSP. Appeal, Attach. 1. Therefore, even if OHR mistakenly placed Appellant back into the ERS, it was incumbent upon Appellant to make inquiries about the correctness of this placement when Appellant began receiving information from OHR about Appellant's contributions into the ERS.

Appellant has also argued that Appellant wasn't informed about vesting Appellant's retirement at the time Appellant left County service in 1995. However, it is clear from the correspondence that OHR sent to Appellant on or about October 10, 1995 that Appellant was more than adequately informed of the options Appellant had – Appellant could either elect to have Appellant's retirement contributions remain in the ERS and receive a benefit upon reaching Appellant's normal retirement date or elect to withdraw Appellant's contributions and interest earned. County's Response, Ex. E. Appellant chose to withdraw Appellant's contributions. Id.

Appellant asserted that Appellant has based Appellant's retirement plans on the information Appellant received from OHR over the years, indicating that Appellant was in the ERS. Now, because of the error, Appellant will have to work three extra years. See Appeal Form; Appeal, Attach. 1. Appellant also noted that Appellant is going to lose quite a bit of money from Appellant's retirement. Appeal, Attach. 1 at 2.

As the County indicated, the doctrine of equitable estoppel is available against the County “where the acts of its officers are within the scope of their authority and justice and right require the public to be estopped.” Berwyn Heights v. Rogers, 228 Md. 271, 279, 179 A.2d 712, 716 (1962); see also Inlet Associates v. Assateague House Condominium Association, 313 Md. 413, 435, 545 A.2d 1296, 1307 (1986). In order for equitable estoppel to apply, the party claiming estoppel must have relied on the action of the County and changed the party's position or made extensive expenditures due to the action. Permanent

Financial Corp. v. Montgomery County, Maryland, 308 Md. 239, 249, 518 A.2d 123, 128 (1986); Anne Arundel County, Maryland v. Muir, 149 Md. App. 617, 636, 817 A.2d 938, 949 (2003). However, equitable estoppel is not available if it would result in a violation of the law.⁴ Muir, 149 Md. App. at 637, 817 A.2d at 950; Permanent Financial Corp., 308 Md. at 249-50, 518 A.2d at 128. See also OPM v. Richmond, 496 U.S. 414 (1990) (even if an employee was misled by his personnel office regarding the calculation of his annuity, the Federal Government cannot be estopped from enforcing a statutory provision governing the federal retirement system and eligibility for public funds).

While Appellant alleges that Appellant based Appellant's retirement plans on information Appellant has received from OHR about Appellant's benefits under the ERS, Appellant has not demonstrated that Appellant has changed Appellant's position or made extensive expenditures due to the error in placing Appellant in ERS. Moreover, it is clear that Appellant's placement in the ERS was contrary to the County Code. Therefore, the Board finds that the County is not estopped from correcting the error made in putting Appellant into the ERS instead of the RSP. The Board finds that the County's action, placing Appellant in the RSP, is in accordance with the law.

ORDER

Based on the above, the Board denies Appellant's appeal.

⁴ As the County correctly noted, for the doctrine of equitable estoppel to apply, there must be an ambiguity in the statute resulting in more than one reasonable interpretation. Muir, 149 A.2d at 638-39, 817 A.2d 950-51. The Board finds that there is no ambiguity in the statute at issue here.

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CASE NO. 11-29
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CASE NO. 11-32
CASE NO. 11-33
CASE NO. 11-34
CASE NO. 11-35
CASE NO. 11-36¹

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (MSPB or Board) on the above-captioned appeal concerning the County's action in furloughing Appellant, giving Appellant and then taking back sixty (60) hours of compensatory time given to County employees in FY10, denying Appellant twenty-six (26) hours of compensatory leave given County employees on January 1, 2011, failing to pay Appellant for the entire 379 hours² of annual leave Appellant had accrued by the end of calendar year (CY) 10, and reducing Appellant's carryover limits for excess annual leave from two hundred and eighty (280) hours to two hundred and forty (240) hours.³ Appellant also grieved the awarding of and subsequent reversal of Appellant's final leave payout, as well as the County's plans to correct personnel actions mistakenly taken by the County over the past two years. The County filed its response (County's Response) to Appellant's grievance on April 18, 2011, which included a spreadsheet explaining the payout to

¹ The substance of the decisions in all of these cases was nearly identical. Therefore, only one decision is included in this Annual Report and is representative of all the cases listed.

² Appellant's original appeal indicated that Appellant had 379 hours of annual leave when Appellant requested permission to carry over 99 hours. In Appellant's Reply, Appellant indicated that Appellant had 479 hours at the end of CY10. Appellant's Reply at 5. Annual leave balance documentation that Appellant submitted as part of Appellant's appeal indicates that 379 is the correct figure. See Memorandum from Appellant, Appeal #11-30, received by the Board on 03/31/11.

³ Although Appellant is not a County employee, see MSPB Case No. 10-02, the County's Office of Human Resources (OHR) provides for the administration of personnel regulations and disbursement of salaries through the County's payroll system. Montgomery County Code, § 21-16(b)(1) & (3). All of the actions Appellant challenges are actions taken through the County's payroll system; therefore, the County, in this case, is the Appellee.

Appellant.⁴ Appellant filed a reply to the County's Response (Appellant's Reply) on May 5, 2011.

FINDINGS OF FACT

The Montgomery County Fire and Rescue Service (MCFRS), which includes the local fire and rescue departments (LFRDs), is charged with the delivery of fire, rescue and emergency services for the County. The Local Volunteer Fire Department (LVFD) is one of the LFRDs, providing fire and rescue services to a designated area of the County. LFRD employees are paid with County tax funds, Montgomery County Code, Section 21-16(a), and receive their salaries through the County's payroll system. Montgomery County Code, Section 21-16(b)(3). Nevertheless, they are not County employees but are members of a separate merit system governed by generally applicable County personnel regulations. Montgomery County Code, Section 21-16(a) & (c); see MSPB Case Nos. 10-02, 10-08, 10-20.

Appellant was an Administrative Staff member with the LVFD and as such was paid through the County's payroll system. On June 22, 2009, the County's Director, Office of Human Resources (OHR), issued a memorandum to Executive Branch Department and Office Directors regarding the compensatory leave award, which one of the County's unions, the Municipal & County Government Employees Organization (MCGEO), had negotiated with the County in lieu of the general wage adjustment⁵ that was not going to take effect for FY10. County's Response, Affidavit of the OHR Director, Attachment (Attach.) 2, Memorandum of Agreement between Montgomery County Government and the Municipal & County Government Employees Organization, United Food & Commercial Workers, Local 1994 and Memorandum from the OHR Director, subject: Implementation of FY2010 Compensatory Leave Award (FY10 Pass-Through Memorandum). The OHR Director indicated in the FY10 Pass-Through Memorandum that this negotiated benefit would be passed through to all County employees at the top of their grade except for management and the police. County's Response, Affidavit of the OHR Director, Attach. 2, FY10 Pass-Through Memorandum. The compensatory leave would have to be used as leave and could not be cashed out upon termination. Id. For full-time employees, the award was sixty (60) hours of compensatory leave. Id. The County's payroll system, MCTime, was programmed to award the leave on an employee's service increment date. Id. Because LFRD employees

⁴ In addition to its Response, the County also filed a memorandum enclosing spreadsheets containing the County's completed audits for leave, furlough and taxes for each of the local fire and rescue department (LFRD) administrative employees who had been terminated.

⁵ A general wage adjustment is defined by the Montgomery County Personnel Regulations (MCPR) as "[a]n across-the-board pay increase of the same amount or the same percentage given to each employee in a particular group." See MCPR, 2001 (as amended), Section 10-1(f).

are paid through the County's payroll system, Appellant was credited with the 60 hours. County's Response, Affidavit of the OHR Director.

For the budget year FY11, the County Council passed a resolution requiring that, effective the pay period beginning July 4, 2010, County employees would have to be furloughed. County's Response, Affidavit of the OHR Director, Attach. 3. The furlough time varied according to an employee's salary (for full-time employees, it was 24, 40 or 64 hours). See Frequently Asked Questions FY2011 Furloughs available at <http://montgomerycountymd.gov/content/ohr/ResourceLibrary/RLMain1.cfm?m=13&c=8>. Furloughs would be rolling in nature, with employees being required to use furlough days in lieu of annual leave days until they had exhausted their furlough time. *Id.* Employees had to request they be allowed to take furlough hours, just as they had to request any other type of leave. *Id.* There was no requirement that employees take their furlough hours; if they failed to do so by June 4, 2011, they simply would forfeit these hours.⁶ *Id.* The furlough time would automatically be deducted by the payroll system over twenty-four (24) pay periods so as to ease the burden on employees' paychecks. *Id.* If an employee left County service before using up all of their furlough time, the County would deduct the furlough time not yet taken from the employee's final paycheck. *Id.* Because LFRD employees are paid through the County's payroll system, they had the furlough time deducted from their paychecks. County's Response, Affidavit of the OHR Director.

On July 6, 2010, the OHR Director notified all Executive Branch Department Directors and Agency Heads that the County had negotiated with MCGEO to grant twenty-six (26) hours of compensatory time to all bargaining unit employees due to the furlough that had been imposed. County's Response, Affidavit of the OHR Director, Attach. 4, Memorandum from the OHR Director, subject: Notice of Additional Bargaining Agreements and Pass-Through to Non-Represented Employees (FY11 Pass-Through Memorandum). The OHR Director indicated that, effective January 1, 2011, all non-represented employees would also be allocated the 26 hours of compensatory time through payroll. *Id.* The only County employees who would not receive the compensatory leave were the County Executive, the Chief Administrative Officer, the Special Assistants to the County Executive and appointed Department Directors. *Id.* Because LFRD employees are paid through the County's payroll system, they were credited with the 26 hours. County's Response, Affidavit of the OHR Director.

On December 2, 2010, the County Executive transmitted a revised FY11 Savings Plan to the County Council which eliminated the funding for twenty LFRD administrative positions, including Appellant's. See FY11 Savings Plan available at <http://www.montgomerycountymd.gov/ombtml.asp?url=/content/omb/index.asp>. On December 14, 2010, the County Council adopted the County Executive's recommendation

⁶ Commencing the first pay period in FY11 until such time as the employee used all of their furlough hours, any leave taken, with the exception of sick leave, personal days, and certain other types of leave, would automatically be converted to furlough leave by the employee's supervisor. See Frequently Asked Questions FY2011 Furloughs available at <http://montgomerycountymd.gov/content/ohr/ResourceLibrary/RLMain1.cfm?m=13&c=8>.

for eliminating funding for the twenty LFRD administrative positions. See Council Resolution No. 17-17 available at <http://www.montgomerycountymd.gov/cshtml.asp?url=/content/council/leg/res/index.asp>.

On February 11, 2011, Appellant was terminated by LVFD due to a reduction-in-force. Prior to Appellant's termination, Appellant, along with various other LFRD administrative employees, filed appeals with the Board challenging their terminations. In one of the appeals filed with the Board, the LFRD employee argued that the LFRD employee was a County employee, as the LFRD employee had been furloughed during FY11 just like all County merit employees. See Decision on Appellant's Request for a Stay, MSPB Case No. 11-12 (2011) at 2-3. The County, in responding to this particular appeal, stated that it had mistakenly furloughed the LFRD employees. Id. at 3. This mistake was due to the fact that the County converted to an automated online payroll system, Mctime, through which both the County employees and the LFRD employees are paid. Id. The County noted that the appellant could have grieved the error regarding the furlough but failed to do so in a timely manner. Id. The Board, in MSPB Case No. 11-12, informed the County that, notwithstanding the untimeliness of the appellant's grievance, the Board expected the County to take appropriate steps to make the appellant and the other LFRD employees whole for its acknowledged error. Id. at 3 n.5.

In another termination case, an LFRD employee argued that the LFRD employee was a County employee because the LFRD employee had received 26 hours of compensatory time, like all County employees did, as of January 14, 2011. See Decision on Appellant's Request for a Stay, MSPB Case No. 11-22 (2011) at 2. The County responded to this argument, indicating that it was an error for Mctime to credit the LFRD employee with the 26 hours and the County had subsequently corrected the error. Id. at 3. In the Board's Decision on Appellant's Request for a Stay in MSPB Case No. 11-22, we noted that while it was regrettable that OHR, through Mctime, mistakenly granted the 26 hours, this administrative error did not change the fact that the Council specifically never intended for LFRD employees to be County employees.

Subsequent to Appellant's termination, as previously noted, the County, in its Response, filed a spreadsheet indicating how it calculated the payout for Appellant. See County's Response, Affidavit of Ms. B, Attach. 1. At the time of Appellant's termination on February 11, 2011, Appellant had an annual leave balance of 403.50 hours.⁷ Id. Because the County determined that Appellant had been furloughed by mistake, the County refunded Appellant the furlough deductions. County's Response, Affidavit of Ms. B at 2 & Attach. 1. It also deducted the amount of furlough leave taken by Appellant - i.e., forty (40) hours - from Appellant's annual leave balance. County's Response, Affidavit of the OHR Director at 2 & Affidavit of Ms. B, Attach. 1. This deduction led to an annual leave balance of 363.50 hours. County's Response, Affidavit of B, Attach. 1.

⁷ It appears Appellant continued to accrue additional leave after Appellant carried over 379 hours from CY10.

The County's spreadsheet also indicates that it deducted from Appellant's annual leave balance 32.50 hours for the compensatory leave Appellant had mistakenly been granted and used. County's Response, Affidavit of Ms. B at 1 & Attach. 1. Thus, according to the County, Appellant's final annual leave balance was 331.00 hours. County's Response, Affidavit of Ms. B, Attach. 1. Based on Appellant's annual salary of \$67,533.00, the County calculated that Appellant was due a payout of \$10,746.84 before deductions.⁸ Id.

POSITIONS OF THE PARTIES

Appellant:

- Prior to transferring to LVFD, Appellant worked for the County. Appellant was concerned that in transferring to the LFRD, Appellant would lose Appellant's County benefits and was assured that Appellant would keep these benefits even after transferring.
- The County is correct that it should not have furloughed LFRD employees.
- It is inexcusable that the County decided a year after granting Appellant 60 hours of compensatory leave that it was a mistake. Appellant was notified to take the 60 hours or lose it and should not be penalized by having the time deducted from Appellant's annual leave balance.
- LFRD employees are to be treated as receiving substantially the same benefits as County employees. Therefore, the 26 hours of compensatory leave granted to non-represented County employees, to compensate them for the lack of a general wage adjustment for FY11, should be passed through to the LFRD employees.
- County employees who were furloughed were granted the ability to carry over 280 hours of annual leave. LFRD employees should also be allowed to do so.
- The County issued Appellant a final leave payout and sent Appellant a notice of the deposit on March 11, 2011. Accordingly, Appellant paid bills based on this deposit. Subsequently, the County reversed the transaction and removed the funds from Appellant's account without informing Appellant,⁹ thus resulting in Appellant going

⁸ This figure was derived by dividing Appellant's annual salary by 2080 hours (i.e., 40 hours a week times 52 weeks, see Montgomery County Personnel Regulations (MCPR), 2001 (as amended), Section 1-4, Base hourly salary definition) for an hourly rate of \$32.46779 and then multiplying this by the annual leave balance of 331.00 hours.

⁹ According to the County, it issued a stop payment order for the March 11, 2011 leave payout to maintain the status quo pending an audit to determine whether the payments had been correctly calculated. County's Response, Affidavit of Ms. B at 1. Subsequently, the County made corrections to Appellant's leave payout by reducing the amount of annual leave to be paid from 403.50 hours to 331.00 hours. Cf. Appellant's Pay Advice for 03/11/11 with Appellant's Pay Advice for 03/25/11. While the County clearly has the right to collect an overpayment from an employee, see MCPR, Section 10-4, the Board finds that the County should have notified Appellant of the stop payment order. The Board expects the County in the future to ensure that any time it issues a stop payment order, it informs the affected employee in a timely manner.

into overdraft and incurring \$40 in fees. Appellant should be reimbursed for these fees.

- Appellant should have been allowed to carry over 280 hours of annual leave instead of 240 hours of leave.

County:

- Appellant did not transfer from County employment to LVFD. Rather, Appellant left County employment and began employment with LVFD. Appellant is not a County employee, and is not subject to or entitled to any terms and conditions of the MCGEO contract.
- The County issued a final paycheck and then withheld it, as it needed to determine what, if any, payroll corrections were needed related to the grant of 60 hours of compensatory time in FY10, the granting of 26 hours of compensatory time in FY11, and the FY11 furlough leave.
- The Board should affirm that Appellant is not entitled to the FY11 grant of 26 hours of compensatory leave to non-represented County employees, as Appellant is not a County employee and the Personnel Regulations do not entitle Appellant to receive this benefit.
- Likewise, the Board should affirm that Appellant is not entitled to the FY10 grant of 60 hours of compensatory leave to non-represented County employees, as Appellant is not a County employee and the Personnel Regulations do not entitle Appellant to receive this benefit.
- As the County needed to correct its mistake of furloughing Appellant, in accordance with the Board’s decision in MSPB Case No. 11-22, it reimbursed Appellant for the furlough deductions made from Appellant’s paychecks and converted any furlough hours taken to annual leave.
- The Board should affirm that the County is correct that as an LFRD employee, Appellant was only entitled to the carryover limit of 240 hours.¹⁰

APPLICABLE LAW AND REGULATIONS

Montgomery County Code, Section 21-16, *Personnel administration for local fire and rescue departments*, which states in applicable part:

- (a) Applicability of County Regulations. Employees of local fire and rescue departments who are paid with tax funds are not County employees. They are members of a separate merit system governed by generally applicable County personnel regulations except as expressly modified by regulations that the County Executive, after receiving Commission approval under Section 21-2(d)(4), adopts under method (2).

¹⁰ The County indicated that Appellant requested to exceed the annual leave cap and the County granted this request. County’s Response at 2. Therefore, there is no need for the Board to decide which cap – 280 or 240 hours – was the correct one.

- (b) Personnel services. The Office of Human Resources must provide the following services to the local fire and rescue departments:
- (1) Uniform administration and application of personnel regulations and policies.
 - (2) Consistent administration and application of a uniform pay plan and benefit program, which must be substantially equivalent to that of the County government.
 - (3) Disbursement of salaries and wages, including withholding for taxes and fringe benefits through the County's payroll system.
 - (4) Review for consistency with applicable personnel regulations all personnel transactions involving employees of local fire and rescue departments paid with tax funds.
 - (5) Use of the Merit System Protection Board.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 10, 2002, March 4, 2003, April 8, 2003, January 18, 2005, February 15, 2005, July 12, 2005, February 14, 2006, June 27, 2006, December 11, 2007, October 21, 2008, and March 9, 2010), Section 10, *Employee Compensation*, which states in applicable part:

10-4. Payroll policies.

- (d) ***Recovery of overpayment or employee debt.***
- (1) ***Recovery of overpayment to employee.***
 - (A) If the County overpays an employee, the CAO may deduct money from the employee's pay to recover the overpayment.
 - (2) ***Recovery of employee debt to County.*** The CAO may set off a debt that an employee or former employee owes to the County and deduct the amount owed from unpaid salary, accrued annual leave or compensatory time, or retirement contributions owed to the employee.
 - (3) ***Employee's right to appeal the County's recovery of an overpayment or debt.*** An employee may file a grievance under Section 34 of these Regulations over a deduction to recover an overpayment or a debt from the employee.

ISSUES

1. As the County has admitted that it was wrong to furlough Appellant and paid Appellant back for the furlough reductions made to Appellant's salary, was it correct for the County to convert Appellant's furlough leave to annual leave?

2. Was the County correct that Appellant mistakenly received 60 hours of compensatory time in FY10? If the County was correct, was it appropriate for the County to deduct the 32.50 hours of compensatory time taken by Appellant from Appellant's annual leave balance?

3. Was the County correct that Appellant mistakenly received 26 hours of compensatory time in FY11?

ANALYSIS AND CONCLUSIONS

The Board Finds That The County Corrected Its Mistake In Furloughing Appellant And Was Correct To Deduct The Furlough Leave Appellant Took From Appellant's Annual Leave Balance.

As previously noted, the County has admitted that it was a mistake to furlough LFRD employees. We agree. The County Council Resolution, implementing the furlough, specifically provided that "[a]ll County employees must take rolling furloughs" See County's Response, Affidavit of the OHR Director, Attach. 3, Council Resolution No. 16-1373 (2010). As we have previously held, LFRD employees are not County employees but rather members of a separate merit system. MSPB Case Nos. 10-02, 10-08, 10-20; see also Montgomery County Code (Code), Section 21-16(a). Thus, when during the course of the litigation over the appeals concerning the termination of LFRD employees, it was brought to the attention of the County that it had furloughed the LFRD employees along with the County's employees, it was incumbent upon the County that it correct this mistake. This the County has done in the instant case. As the spreadsheet provided by the County clearly indicates, it has refunded Appellant \$865.76 less Medicare and Social Security tax deductions. County's Response, Affidavit of Ms. B, Attach. 1.

Under the guidelines issued by the County for the furlough, employees had to take furlough leave before taking annual leave in most cases. See Frequently Asked Questions FY2011 Furloughs [available at http://montgomerycountymd.gov/content/ohr/ResourceLibrary/RLMain1.cfm?m=13&c=8](http://montgomerycountymd.gov/content/ohr/ResourceLibrary/RLMain1.cfm?m=13&c=8). Significantly, employees had to request they be allowed to take furlough hours. Id. Moreover, there was no requirement that employees take furlough hours; if they failed to do so by June 4, 2011, they simply would forfeit these hours. Id. Appellant chose to take forty hours of furlough leave. When the County determined that it was a mistake to furlough Appellant, it refunded Appellant the furlough deductions made. Absent having furlough leave available to Appellant, when the Appellant requested leave it would normally have been deducted from Appellant's annual leave account or Appellant's compensatory leave account if Appellant had any. Therefore, the Board finds the County was correct to deduct

the furlough leave taken by Appellant from Appellant's annual leave balance.

The Board Finds That Appellant Was Not Entitled To The Sixty Hours Of Compensatory Leave Granted County Employees In FY10; Accordingly, The County Was Correct To Deduct The Compensatory Leave Taken By Appellant From Appellant's Annual Leave Account.

In FY10, the County negotiated with MCGEO to grant all bargaining unit members who were at the top of their salary grade in FY10 a one time grant of 60 hours of annual leave. County's Response, Affidavit of the OHR Director. Subsequently, the OHR Director issued the FY10 Pass-Through Memorandum, providing non-represented County employees with the benefit negotiated with MCGEO. County's Response, Affidavit of the OHR Director & Attach. 2. According to the OHR Director, LFRD employees should not have received the benefit, as they are not County employees. County's Response, Affidavit of the OHR Director at 1.

Significantly, the 60 hours of compensatory leave award is not provided for in the Montgomery County Personnel Regulations. *Id.* Thus, there was no requirement that LFRD employees be given this benefit.¹¹ Rather, this benefit was negotiated with a County union and then, at the County's discretion, passed along to non-represented County employees. As the benefit was not mandatory but discretionary, the Board finds that the OHR Director, who signed the FY10 Pass-Through Memorandum, is in the best position to know who was meant to be covered by the OHR Director's memorandum. The OHR Director indicates that the OHR Director passed the benefit through only to County employees. County's Response, Affidavit of the OHR Director at 1. Accordingly, the Board finds that the County was correct when it determined Appellant was not entitled to this benefit. As Appellant had already taken the 32.50 hours, *see* County's Response, Affidavit of Ms. B & Attach. 1, the County, pursuant to Section 10-4 of the MCPR, had the right to recover the debt owed to the County by Appellant.¹²

Accordingly, based on the foregoing analysis, the Board finds that Appellant's final annual leave payout for 331.00 hours was correct after the County deducted the 40 hours of furlough leave used by Appellant and the 32.50 hours of compensatory leave award which Appellant used from Appellant's original annual leave balance of 403.50 hours.

¹¹ The Board notes that the statute only requires that LFRD employees have a pay and benefit program that is **substantially** equivalent to that of the County Government. Montgomery County Code, Section 21-16(b)(2) (emphasis added). Thus, not every benefit given to a County Government employee must be given to an LFRD employee.

¹² The Board would note that the MCPR imposes no time limit on the County for recovery of an overpayment made to an employee. *See generally* MCPR, 2001 (as amended) Section 10-4.

The Board Finds That Appellant Was Not Entitled To The Twenty-Six Hours Of Compensatory Leave Granted County Employees In FY11.

In FY11, the County negotiated with MCGEO to grant its bargaining unit members 26 hours of compensatory leave, effective January 1, 2011. County's Response, Affidavit of the OHR Director & Attach. 4. Subsequently, the OHR Director issued the FY11 Pass-Through Memorandum, providing non-represented County employees with the benefit negotiated with MCGEO. Id. According to the OHR Director, LFRD employees should not have received the benefit, as they are not County employees. County's Response, Affidavit of the OHR Director at 2.

The Board finds that the 26 hours of compensatory leave award is not provided for in the Montgomery County Personnel Regulations. Id. Therefore, there is no requirement that LFRD employees be given this benefit. As the benefit was not mandatory but discretionary, the Board finds that the OHR Director, who signed the FY11 Pass-Through Memorandum, is in the best position to know who was meant to be covered by the OHR Director memorandum. The OHR Director indicates that the OHR Director passed the benefit through only to County employees. County's Response, Affidavit of the OHR Director at 2. Accordingly, the Board finds that the County was correct when it determined Appellant was not entitled to this benefit and rescinded the 26 hours mistakenly given to Appellant.

ORDER

Based on the foregoing analysis, the Board denies the appeal and affirms the County's leave payout to Appellant.

CASE NO. 11-27

FINAL DECISION AND ORDER

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on the above-captioned grievance concerning the County's action in furloughing Appellant, denying Appellant the twenty-six (26) hours of compensatory leave given County employees on January 1, 2011, and reducing the carry over limits for excess annual leave from two hundred and eighty (280) hours to two hundred and forty (240) hours. The County¹ filed its response (County's Response) to Appellant's grievance on March 10, 2011, and Appellant filed Appellant's reply to the County's Response (Appellant's Reply) on March 24, 2011. In Appellant's Reply, Appellant raised the additional issue of the County's decision that the sixty (60) hours of compensatory leave granted Appellant in FY10 was a mistake.² On April 4, 2011, the County filed a Supplemental Response (County's Supplemental Response). Appellant filed a supplemental reply to the County's Supplemental Response (Appellant's Supplemental Reply) on April 12, 2011. In addition, Appellant filed another supplement to Appellant's reply (Appellant's Supplemental Reply II) on May 11, 2011.

Subsequently, the Board asked the County to provide additional evidence regarding Appellant's claim that the County inappropriately deducted the 60 hours of compensatory time from Appellant's paycheck twice.³ The County filed a response to the various matters raised by the Board (County's Supplemental Submission) on June 1, 2011, and Appellant filed additional comments (Appellant's Supplemental Reply III) on June 7, 2011.

FINDINGS OF FACT

The Montgomery County Fire and Rescue Service (MCFRS), which includes the local fire and rescue departments (LFRDs), is charged with the delivery of fire, rescue and

¹ Although Appellant is not a County employee, see MSPB Case No. 10-02, the County's Office of Human Resources (OHR) provides for the administration of personnel regulations and disbursement of salaries through the County's payroll system. Montgomery County Code, § 21-16(b)(1) & (3). As all of the actions Appellant challenges are actions taken through the County's payroll system, the County, in this case, is the Appellee.

² Appellant also raised the issue of eight (8) hours of compensatory leave that Appellant claims the County owes Appellant for Inauguration Day 2009. This matter was the subject of Appellant's appeal in MSPB Case No. 10-20 (2010). The Board found in that case that Appellant's appeal on the matter to the Board was untimely. Accordingly, the Board will not address this matter further.

³ The Board also questioned the County about the hourly rate used to calculate Appellant's final leave payout as well as the number of pay periods for which Appellant was owed Appellant's retroactive service increment.

emergency services for the County. The Local Volunteer Fire Department (LVFD) is one of the LFRDs, providing fire and rescue services to a designated area of the County. LFRD employees are paid with County tax funds, Montgomery County Code, Section 21-16(a), and receive their salaries through the County's payroll system. Montgomery County Code, Section 21-16(b)(3). Nevertheless, they are not County employees but are members of a separate merit system governed by generally applicable County personnel regulations. Montgomery County Code, Section 21-16(a) & (c); see MSPB Case Nos. 10-02, 10-08, 10-20.

Appellant was an Administrative Specialist with the LVFD and as such was paid through the County's payroll system. On June 22, 2009, the County's Director, Office of Human Resources (OHR), issued a memorandum to Executive Branch Department and Office Directors regarding the compensatory leave award, which one of the County's unions, the Municipal & County Government Employees Organization (MCGEO), had negotiated with the County in lieu of the general wage adjustment⁴ that was not going to take effect for FY10. County's Response, Affidavit of the OHR Director, Attachment (Attach.) 2, Memorandum of Agreement between Montgomery County Government and the Municipal & County Government Employees Organization, United Food & Commercial Workers, Local 1994 and Memorandum from the OHR Director, subject: Implementation of FY2010 Compensatory Leave Award (FY10 Pass-Through Memorandum). The OHR Director indicated in the FY10 Pass-Through Memorandum that this negotiated benefit would be passed through to all County employees at the top of their grade except for management and the police. County's Response, Affidavit of the OHR Director, Attach. 2, FY10 Pass-Through Memorandum. The compensatory leave would have to be used as leave and could not be cashed out upon termination. Id. For full-time employees, the award was sixty (60) hours of compensatory leave. Id. The County's payroll system, MCTime, was programmed to award the leave on an employee's service increment date. Id. Because LFRD employees are paid through the County's payroll system, Appellant was credited with the 60 hours. County's Response, Affidavit of the OHR Director.

For the budget year FY11, the County Council passed a resolution requiring that, effective the pay period beginning July 4, 2010, County employees would have to be furloughed. County's Response, Affidavit of the OHR Director, Attach. 3. The furlough time varied according to an employee's salary (for full-time employees, it was 24, 40 or 64 hours). See Frequently Asked Questions FY2011 Furloughs available at <http://montgomerycountymd.gov/content/ohr/ResourceLibrary/RLMain1.cfm?m=13&c=8>. Furloughs would be rolling in nature, with employees being required to use furlough days in lieu of annual leave days until they had exhausted their furlough time. Id. Employees had to request they be allowed to take furlough hours, just as they had to request any other type of leave. Id. There was no requirement that employees take their furlough hours; if they failed

⁴ A general wage adjustment is defined by the Montgomery County Personnel Regulations (MCPR) as "[a]n across-the-board pay increase of the same amount or the same percentage given to each employee in a particular group." See MCPR, 2001 (as amended), Section 10-1(f).

to do so by June 4, 2011, they simply would forfeit these hours.⁵ Id. The furlough time would automatically be deducted by the payroll system over twenty-four (24) pay periods so as to ease the burden on employees' paychecks. Id. If an employee left County service before using up all of their furlough time, the County would deduct the furlough time not yet taken from the employee's final paycheck. Id. Because LFRD employees are paid through the County's payroll system, they had the furlough time deducted from their paychecks. County's Response, Affidavit of the OHR Director.

On July 6, 2010, the OHR Director notified all Executive Branch Department Directors and Agency Heads that the County had negotiated with MCGEO to grant 26 hours of compensatory time to all bargaining unit employees due to the furlough that had been imposed. County's Response, Affidavit of the OHR Director, Attach. 4, Memorandum from the OHR Director, subject: Notice of Additional Bargaining Agreements and Pass-Through to Non-Represented Employees (FY11 Pass-Through Memorandum). The OHR Director indicated that, effective January 1, 2011, all non-represented employees would also be allocated the 26 hours of compensatory time through payroll. Id. The only County employees who would not receive the compensatory leave were the County Executive, the Chief Administrative Officer, the Special Assistants to the County Executive and appointed Department Directors. Id. Because LFRD employees are paid through the County's payroll system, they were credited with the 26 hours. County's Response, Affidavit of the OHR Director.

On December 2, 2010, the County Executive transmitted a revised FY11 Savings Plan to the County Council which eliminated the funding for twenty LFRD administrative positions, including Appellant's. See FY11 Savings Plan available at <http://www.montgomerycountymd.gov/ombtml.asp?url=/content/omb/index.asp>. On December 14, 2010, the County Council adopted the County Executive's recommendation for eliminating funding for the twenty LFRD administrative positions. See Council Resolution No. 17-17 available at <http://www.montgomerycountymd.gov/cshtml.asp?url=/content/council/leg/res/index.asp>.

On February 11, 2011, Appellant was terminated by LVFD due to a reduction-in-force. Prior to Appellant's termination, Appellant, along with various other LFRD administrative employees, filed appeals with the Board challenging their terminations. In one of the appeals filed with the Board, the LFRD employee argued that the LFRD employee was a County employee, as the LFRD employee had been furloughed during FY11 just like all County merit employees. See Decision on Appellant's Request for a Stay, MSPB Case No. 11-12 (2011) at 2-3. The County, in responding to this particular appeal, stated that it had mistakenly furloughed the LFRD employees. Id. at 3. This mistake was due to the fact that the County converted to an automated online payroll system, Mctime, through which

⁵ Commencing the first pay period in FY11 until such time as the employee used all of their furlough hours, any leave taken, with the exception of sick leave, personal days, and certain other types of leave, would automatically be converted to furlough leave by the employee's supervisor. See Frequently Asked Questions FY2011 Furloughs available at <http://montgomerycountymd.gov/content/ohr/ResourceLibrary/RLMain1.cfm?m=13&c=8>.

both the County employees and the LFRD employees are paid. Id. The County noted that the appellant could have grieved the error regarding the furlough but failed to do so in a timely manner. Id. The Board, in MSPB Case No. 11-12, informed the County that, notwithstanding the untimeliness of the appellant's grievance, the Board expected the County to take appropriate steps to make the appellant and the other LFRD employees whole for its acknowledged error. Id. at 3 n.5.

In Appellant's appeal challenging Appellant's reduction-in-force, Appellant argued that Appellant was treated as a County employee because Appellant had received 26 hours of compensatory time, like all County employees did, as of January 14, 2011. See Decision on Appellant's Request for a Stay, MSPB Case No. 11-22 (2011) at 2. The County responded to this argument, indicating that it was an error for MCTime to credit the LFRD employee with the 26 hours and the County had subsequently corrected the error. Id. at 3. In the Board's Decision on Appellant's Request for a Stay in MSPB Case No. 11-22, we noted that while it was regrettable that OHR, through MCTime, mistakenly granted the 26 hours, this administrative error did not change the fact that the Council specifically never intended for LFRD employees to be County employees.

Subsequent to Appellant's termination, as previously noted, the County, in its Supplemental Response, filed a spreadsheet indicating how it calculated the payout for Appellant. See County's Supplemental Response, Affidavit of Ms. B, Attach. 1. At the time of Appellant's termination on February 11, 2011, Appellant had an annual leave balance of 302.00 hours. Id.; see also Appellant's Supplemental Reply III, Attach. A. Because the County determined that Appellant had been furloughed by mistake, the County refunded Appellant the furlough deductions. County's Supplemental Response, Affidavit of Ms. B at 2 & Attach. 1; see also County's Supplemental Submission, Attach. 2. It also deducted the amount of furlough leave taken by Appellant – i.e., forty (40) hours – from Appellant's annual leave balance. County's Response, Affidavit of the OHR Director at 2; County's Supplemental Response, Affidavit of Ms. B, Attach. 1. This deduction led to an annual leave balance of 262.00 hours. County's Supplemental Response, Affidavit of Ms. B, Attach. 1.

The County's spreadsheet also indicates that it deducted from Appellant's annual leave balance 60 hours for the compensatory leave Appellant had mistakenly been granted and used. County's Supplemental Response, Affidavit of Ms. B at 1 & Attach. 1. Thus, according to the County, Appellant's final annual leave balance was 202.00 hours. County's Supplemental Response, Affidavit of Ms. B, Attach. 1. Based on Appellant's annual salary of \$85,463.00, the County calculated that Appellant was due a payout of \$8,299.78.⁶ Id. The County's spreadsheet indicates that once Medicare and Social Security taxes were deducted from Appellant's annual leave payment, the resulting net payment was rolled over to

⁶ This figure was derived by dividing Appellant's annual salary by 2080 hours (i.e., 40 hours a week times 52 weeks, see Montgomery County Personnel Regulations, 2001 (as amended), Section 1-4, Base hourly salary definition) for an hourly rate of \$41.088 and then multiplying this by the annual leave balance of 202.00 hours.

Appellant's ING Deferred Compensation account. Id.; see also County's Supplemental Submission, Affidavit of Ms. B, Attach. 5.

The County's spreadsheet also indicates that it discovered a mistake had been made in Appellant's annual leave payout. County's Supplemental Response, Affidavit of Ms. B, Attach. 1. Specifically, the County noted that because it had granted Appellant a 2% longevity/performance increment retroactive to July 5, 2009, see County's Response, Affidavit of the OHR Director II,⁷ it had offset the money owed Appellant by deducting the value of the 60 hours of compensatory time mistakenly granted to Appellant.⁸ Id.; County's Supplemental Response, Affidavit of B, Attach. 1. Accordingly, the spreadsheet noted that Appellant would receive a deposit by March 31, 2011 for 60 hours of compensatory time mistakenly deducted from Appellant's annual leave balance. Id. The County's Supplemental Submission indicates that payment for 60 hours of annual leave was made to Appellant's ING Deferred Compensation Account on March 31, 2011. See County's Supplemental Submission, Affidavit of B, Attach. 3. The County now claims that it should not have made this payment. See County's Supplemental Submission at 1 & Affidavit of B at 1. Appellant disputes the County's claim. See Appellant's Supplemental Reply III.

POSITIONS OF THE PARTIES

Appellant:

- The Board in MSPB Case No. 11-12 told the County that it expected the County to make LFRD employees whole for its acknowledged error in furloughing the LFRD employees. The County should return all furlough money removed from Appellant's paycheck and ensure that Appellant is paid at Appellant's regular pay rate for the remaining paychecks and the annual leave and compensatory leave payouts.
- Forty hours of annual leave should not have been deducted from Appellant's leave balance; instead a prorated amount of leave of 24.70 hours should be deducted and the remaining 15.30 hours credited back to Appellant's annual leave balance.

⁷ The County's Response contained two Affidavits from the OHR Director. For ease of reference, the affidavit dealing with Appellant's retroactive performance increment has been designated as Affidavit of the OHR Director II.

⁸ The OHR Director noted that the County owed Appellant back pay of \$2,710.34 for the performance increment. County's Response, Affidavit of the OHR Director II at 1. As the County had mistakenly granted Appellant 60 hours of compensatory leave which Appellant had taken, it offset the value of this leave (i.e., 60 hours multiplied by Appellant's hourly rate of \$41.088 for a total of \$2,465.28) from what was owed Appellant. Id. The OHR Director indicated that after the offset, Appellant was owed \$245.06, less deductions, and received \$167.43. Id.; see also County's Supplemental Submission, Affidavit of Ms. B, Attach. 2. Appellant, in an email to the Board, OHR and the County Attorney's Office, dated 03/03/11, subject: MSPB Case #11-27, acknowledged that Appellant had received a check for \$245.06 gross for retroactive pay but indicated Appellant thought Appellant should have received more.

- It is inexcusable that the County decided a year after granting Appellant 60 hours of compensatory leave that it was a mistake. Appellant was notified to take the 60 hours or lose it and should not be penalized by having the time deducted from Appellant’s annual leave balance.
- LFRD employees are to be treated as receiving substantially the same benefits as County employees. Therefore, the 26 hours of compensatory leave granted to non-represented County employees, to compensate them for the lack of a general wage adjustment for FY11, should be passed through to the LFRD employees.
- Appellant received the retroactive longevity step because it was a negotiated benefit, automatically available to non-represented employees and therefore correctly applied to the LFRD employees, the same as general wage adjustments.
- County employees who were furloughed were granted the ability to carry over 280 hours of annual leave. LFRD employees should also be allowed to do so.
- The County deducted the 60 hours of compensatory time from Appellant’s paycheck twice.

County:

- The Board should affirm that Appellant is not entitled to the FY11 grant of 26 hours of compensatory leave to non-represented County employees, as Appellant is not a County employee and the Personnel Regulations do not entitle Appellant to receive this benefit.
- Likewise, the Board should affirm that Appellant is not entitled to the FY10 grant of 60 hours of compensatory leave to non-represented County employees, as Appellant is not a County employee and the Personnel Regulations do not entitle Appellant to receive this benefit.
- As the County needed to correct its mistake of furloughing Appellant, in accordance with the Board’s decision in MSPB Case No. 11-22, it reimbursed Appellant for the furlough deductions made from Appellant’s paychecks and converted any furlough hours taken to annual leave.
- Appellant took the full 40 hours of furlough leave; therefore, all 40 hours must be deducted from Appellant’s annual leave balance.
- The Board should affirm that the County is correct that as an LFRD employee, Appellant was only entitled to the carryover limit of 240 hours.⁹
- The Board should confirm that the County correctly paid Appellant Appellant’s 2% twenty-year longevity increment.
- Appellant received the longevity increment because, read together, Montgomery County Code, Section 21-16(a) and MCPR, Section 12-9, directs that upon 20 years of service, LFRD employees are eligible to receive a 2% increase to their base pay.
- The Board should affirm that the County mistakenly paid Appellant for 60 hours of annual leave on March 31, 2011 and order Appellant to repay that amount less money

⁹ According to the County, Appellant requested to exceed the annual leave cap and was granted this request. See County’s Supplemental Response at 2. Therefore, there is no need for the Board to decide which cap – 280 or 240 hours – was the correct one.

owed by the County to Appellant.¹⁰

APPLICABLE LAW AND REGULATIONS

Montgomery County Code, Section 21-16, *Personnel administration for local fire and rescue departments*, which states in applicable part:

- (a) Applicability of County Regulations. Employees of local fire and rescue departments who are paid with tax funds are not County employees. They are members of a separate merit system governed by generally applicable County personnel regulations except as expressly modified by regulations that the County Executive, after receiving Commission approval under Section 21-2(d)(4), adopts under method (2).
- (b) Personnel services. The Office of Human Resources must provide the following services to the local fire and rescue departments:
 - (1) Uniform administration and application of personnel regulations and policies.
 - (2) Consistent administration and application of a uniform pay plan and benefit program, which must be substantially equivalent to that of the County government.
 - (3) Disbursement of salaries and wages, including withholding for taxes and fringe benefits through the County's payroll system.
 - (4) Review for consistency with applicable personnel regulations all personnel transactions involving employees of local fire and rescue departments paid with tax funds.
 - (5) Use of the Merit System Protection Board.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 10, 2002, March 4, 2003, April 8, 2003, January 18, 2005, February 15, 2005, July 12, 2005, February 14, 2006, June 27, 2006, December 11, 2007, October 21, 2008, and March 9, 2010), Section 10, *Employee Compensation*, which states in applicable part:

10-4. Payroll policies.

¹⁰ The County, as discussed *infra*, acknowledges it owes Appellant \$65.76 for Appellant's retroactive increase and \$166.76 for Appellant's final leave payout for a total of \$231.80. *See* County's Supplemental Submission at 1. Because the County calculates the value of the 60 hours of annual leave paid to Appellant on March 30, 2011 at \$2,465.28, it seeks to have the Board order Appellant to reimburse the County for \$2,233.48. *Id.*

- (d) ***Recovery of overpayment or employee debt.***
 - (1) ***Recovery of overpayment to employee.***
 - (A) If the County overpays an employee, the CAO may deduct money from the employee's pay to recover the overpayment.
 - (2) ***Recovery of employee debt to County.*** The CAO may set off a debt that an employee or former employee owes to the County and deduct the amount owed from unpaid salary, accrued annual leave or compensatory time, or retirement contributions owed to the employee.
 - (3) ***Employee's right to appeal the County's recovery of an overpayment or debt.*** An employee may file a grievance under Section 34 of these Regulations over a deduction to recover an overpayment or a debt from the employee.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended January 18, 2005, February 14, 2006, December 11, 2007, and October 21, 2008), Section 12, *Service Increments*, which states in applicable part:

12-9. Twenty-year longevity/performance increment.

- (a) A 20-year longevity/performance increment is a one-time increase to an employee's base salary.
- (b) A department director must award a 20-year longevity/performance increment of 2 percent of base salary to an employee in a position on the general salary schedule if the employee's salary is at the top of the pay range and the employee:
 - (1) has 20 years of actual County service; and
 - (2) received an annual overall performance rating of *Highly Successful Performance* or *Exceptional Performance* for the 2 most recent consecutive years.

ISSUES

1. As the County has admitted that it was wrong to furlough Appellant and paid Appellant back for the furlough reductions made to Appellant's salary, was it correct for the County to convert Appellant's furlough leave to annual leave? If the County was correct to deduct the leave, should the County have deducted all 40 hours of furlough leave taken by Appellant?

2. Was the County correct that Appellant mistakenly received 60 hours of compensatory time in FY10? If the County was correct, was it appropriate for the County to offset the money owed Appellant for Appellant's retroactive service increment by the 60 hours of compensatory time taken by Appellant?

3. Did the County incorrectly deduct the 60 hours of compensatory leave from Appellant's final annual leave balance?

4. Was the County correct that Appellant mistakenly received 26 hours of compensatory time in FY11?

5. Did the County correctly pay Appellant for Appellant's retroactive service increment?

6. Did the County accurately pay Appellant for Appellant's final annual leave balance?

ANALYSIS AND CONCLUSIONS

The Board Finds That The County Corrected Its Mistake In Furloughing Appellant And Was Correct To Deduct The Forty Hours Of Furlough Leave Appellant Took From Appellant's Annual Leave Balance.

As previously noted, the County has admitted that it was a mistake to furlough LFRD employees. We agree. The County Council Resolution, implementing the furlough, specifically provided that "[a]ll County employees must take rolling furloughs" See County's Response, Affidavit of the OHR Director, Attach. 3, Council Resolution No. 16-1373 (2010). As we have previously held, LFRD employees are not County employees but rather members of a separate merit system. MSPB Case Nos. 10-02, 10-08, 10-20; see also Montgomery County Code (Code), Section 21-16(a). Thus, when during the course of the litigation over the appeals concerning the termination of LFRD employees, it was brought to the attention of the County that it had furloughed the LFRD employees along with the County's employees, it was incumbent upon the County that it correct this mistake. This the County has done in the instant case. As the spreadsheet provided by the County clearly indicates, it has refunded Appellant \$1,095.68 less Medicare and Social Security tax deductions. County's Supplemental Response, Affidavit of Ms. B, Attach. 1; County's Supplemental Submission, Affidavit of Ms. B, Attach. 5.

Under the guidelines issued by the County for the furlough, employees had to take furlough leave before taking annual leave in most cases. See Frequently Asked Questions FY2011 Furloughs available at <http://montgomerycountymd.gov/content/ohr/ResourceLibrary/RLMain1.cfm?m=13&c=8>. Significantly, employees had to request they be allowed to take furlough hours. Id. Moreover, there was no requirement that employees take furlough hours; if they failed to do so by June 4, 2011, they simply would forfeit these hours. Id. Appellant chose to take forty hours of furlough leave. When the County determined that it was a mistake to furlough Appellant, it refunded Appellant the furlough deductions made. Absent having furlough leave available to Appellant, when the Appellant requested leave it would normally have been deducted from Appellant's annual leave account or Appellant's compensatory leave account if Appellant had any. Therefore, the Board finds the County was correct to deduct the furlough leave taken by Appellant from Appellant's annual leave balance.

Appellant claims that forty hours of furlough leave should not have been deducted from Appellant's annual leave balance; instead, a prorated amount of leave of 24.70 hours should be deducted and the remaining 15.30 hours credited back to Appellant's annual leave balance. Appellant's Supplemental Reply. The County explains that there is no basis to prorate the leave as Appellant took all 40 hours of the furlough leave. County's Supplemental Submission, Affidavit of Ms. B at 1. We agree with the County that there is no basis for Appellant's claim that the leave Appellant took should be prorated.

The Board Finds That Appellant Was Not Entitled To The Sixty Hours Of Compensatory Leave Granted County Employees In FY10; Accordingly, The County Was Correct To Deduct This Amount From Money Owed To Appellant For Appellant's Retroactive Longevity Increment.

In FY10, the County negotiated with MCGEO to grant all bargaining unit members who were at the top of their salary grade in FY2010 a one time grant of 60 hours of annual leave. County's Response, Affidavit of OHR Director. Subsequently, the OHR Director issued the FY10 Pass-Through Memorandum, providing non-represented County employees with the benefit negotiated with MCGEO. County's Response, Affidavit of OHR Director & Attach. 2. According to the OHR Director, LFRD employees should not have received the benefit, as they are not County employees. County's Response, Affidavit of OHR Director at 1.

Significantly, the 60 hours of compensatory leave award is not provided for in the Montgomery County Personnel Regulations. Id. Thus, there was no requirement that LFRD employees be given this benefit.¹¹ Rather, this benefit was negotiated with a County union and then, at the County's discretion, passed along to non-represented County employees. As the benefit was not mandatory but discretionary, the Board finds that the OHR Director, who

¹¹ The Board notes that the statute only requires that LFRD employees have a pay and benefit program that is **substantially** equivalent to that of the County Government. Montgomery County Code, Section 21-16(b)(2) (emphasis added). Thus, not every benefit given to a County Government employee must be given to an LFRD employee.

signed the FY10 Pass-Through Memorandum, is in the best position to know who was meant to be covered by the OHR Director's memorandum. The OHR Director indicates that the OHR Director passed the benefit through only to County employees. County's Response, Affidavit of the OHR Director at 1. Accordingly, the Board finds that the County was correct when it determined Appellant was not entitled to this benefit. As Appellant had already taken the 60 hours, see County's Supplemental Response, Affidavit of Ms. B & Attach. 1, the County, pursuant to Section 10-4 of the MCPR, had the right to recover the debt owed to the County by Appellant.¹² Therefore, the County was correct to use this as an offset to the amount of retroactive pay due Appellant for Appellant's service increment.

The County Incorrectly Deducted The Sixty Hours Of Compensatory Time From Appellant's Final Annual Leave Balance.

When the County discovered that it mistakenly had granted the 60 hours of compensatory time to the LFRD employees, it deducted the amount of compensatory leave taken by the particular LFRD employee from their annual leave account. County's Supplemental Response, Affidavit of Ms. B at 1. Appellant's situation was unique, as the County also discovered that Appellant was owed a retroactive service increment. Because the value of the retroactive increment was greater than the value of the 60 hours of compensatory time taken by Appellant, the County correctly took an offset to gain back the money mistakenly given to the Appellant in the form of compensatory leave.

However, the County nevertheless also subsequently deducted the 60 hours of compensatory leave from Appellant's final annual leave balance. See County's Supplemental Response, Affidavit of Ms. B, Attach. 1. As previously noted, Appellant had 302.00 hours of annual leave at the time of Appellant's termination before the County made a deduction of 40 hours for the furlough leave mistakenly given Appellant, which Appellant took. County's Response, Affidavit of the OHR Director at 2; County's Supplemental Response, Affidavit of Ms. B, Attach. 1. This deduction led to an annual leave balance of 262.00 hours. County's Supplemental Response, Affidavit of Ms. B, Attach. 1. The County then deducted the value of the 60 hours of compensatory time mistakenly given to Appellant from the 262.00 balance and paid Appellant for 202.00 hours. Id.; County's Supplemental Submission, Affidavit of Ms. B, Attach. 5¹³.

The County subsequently noted that it should not have deducted the 60 hours of compensatory time, as it had used the value of this leave taken by Appellant as an offset against the money owed Appellant for Appellant's retroactive longevity service increment.

¹² The Board would note that the MCPR imposes no time limit on the County for recovery of an overpayment made to an employee. See generally MCPR, 2001 (as amended) Section 10-4.

¹³ Attachment 5 is Appellant's Pay Advice for the pay period ending March 12, 2011 (with a payment date of March 25, 2011). This Pay Advice shows that Appellant was paid \$8,299.78 for 202.00 hours of annual leave.

County's Supplemental Response, Affidavit of Ms. B, Attach. 1. The County indicated it would make a payment for the 60 hours incorrectly deducted from Appellant's annual leave balance on March 31, 2011. Id. This the County has done. See County's Supplemental Submission, Affidavit of Ms. B, Attach. 3.¹⁴

The County now inexplicably claims that it was a mistake to pay Appellant for the 60 hours of annual leave. See County Supplemental Submission. According to the County, on March 30, 2011, the County mistakenly again granted Appellant 60 hours of compensatory leave and it cites to Appellant's Pay Advice for March 30, 2011. Id., Affidavit of Ms. B, Attach. 3. What the Pay Advice demonstrates is that Appellant was paid for 60 hours of annual leave which had erroneously been deducted from Appellant's final annual leave balance as an offset to the 60 hours of compensatory time Appellant took. County's Supplemental Response, Affidavit of Ms. B, Attach. 1. As the County had already taken an offset of the value of this compensatory leave when it paid Appellant for Appellant's retroactive service increment, the County should not take a second offset and was correct when it determined to pay Appellant on March 31, 2011 for this 60 hours mistakenly deducted from Appellant's final leave balance. The Board is at a loss to understand why the County now considers this payment to be an error.

The Board Finds That Appellant Was Not Entitled To The Twenty-Six Hours Of Compensatory Leave Granted County Employees In FY11.

In FY11, the County negotiated with MCGEO to grant its bargaining unit members 26 hours of compensatory leave, effective January 1, 2011. County's Response, Affidavit of the OHR Director & Attach. 4. Subsequently, the OHR Director issued the FY11 Pass-Through Memorandum, providing non-represented County employees with the benefit negotiated with MCGEO. Id. According to the OHR Director, LFRD employees should not have received the benefit, as they are not County employees. County's Response, Affidavit of the OHR Director at 2.

The Board finds that the 26 hours of compensatory leave award is not provided for in the Montgomery County Personnel Regulations. Id. Therefore, there is no requirement that LFRD employees be given this benefit. As the benefit was not mandatory but discretionary, the Board finds that the OHR Director, who signed the FY11 Pass-Through Memorandum, is in the best position to know who was meant to be covered by the OHR Director's memorandum. The OHR Director indicates that the OHR Director passed the benefit through only to County employees. County's Response, Affidavit of the OHR Director at 2. Accordingly, the Board finds that the County was correct when it determined Appellant was not entitled to this benefit and rescinded the 26 hours mistakenly given Appellant.

¹⁴ Appellant states that Appellant does not recall seeing the March 30, 2011 award for the 60 hours. Appellant's Supplemental Reply III at 1. The County indicates that it rolled the amount, less tax deductions, into the Appellant's ING Deferred Compensation account. See County's Supplemental Submission, Affidavit of Ms. B, Attach. 3 (Appellant's Pay Advice for the payment date of March 30, 2011).

As The Personnel Regulations Provide For A Twenty-Year Longevity Service Increment, The County Was Correct To Pay Appellant For This Retroactively. However, The Board Finds That The Payment Made To Appellant Was Incorrect.

Appellant provided the County with the two required above average performance evaluations Appellant received from the LVFD shortly before Appellant's termination to demonstrate Appellant's entitlement to a longevity service increment. See Appellant's Reply at 2. Based on this documentation, the County granted Appellant a retroactive 2% longevity service increment as provided for in the MCPR, which also applies to the LFRD employees. See County's Response, Affidavit of the OHR Director II. The retroactive service increment was effective July 5, 2009. Id.

The County calculated that the value of the retroactive service increment was \$2,710.34.¹⁵ Id., Attach. 1. This represented payment for a total of 41 pay periods, based on the hours Appellant worked each pay period.¹⁶ Id. However, the Board questioned the County about this calculation, noting that there were 42 pay periods between the effective date of the increase and Appellant's termination. See Email from Board staff to Assistant County Attorney, dated 05/19/11, subject: MSPB Case No. 11-27. The County reviewed this issue and agreed with the Board's assessment. See County's Supplemental Submission, Affidavit of Ms. B at 2 & Attach. 4. Accordingly, the County agrees that it owes Appellant an additional \$65.76. Id.

The Board Finds That The County Did Not Accurately Pay Appellant For Appellant's Final Annual Leave Balance.

The County made two payments to Appellant for Appellant's annual leave. On March 25, 2011, the County paid Appellant \$8,299.78 for 202 hours of annual leave. County's Supplemental Submission, Affidavit of B at 2 & Attach. 5. The Board questioned this calculation, as it reflected a payout made at Appellant's hourly rate before Appellant

¹⁵ The 2% increase resulted in Appellant's hourly rate going from \$41.088 to \$41.910. See County's Response, Affidavit of the OHR Director II at 1 & Attach. 1. Thus, the difference in Appellant's hourly rate was \$00.822. County's Response, Affidavit of the OHR Director II, Attach. 1. Based on an 80-hour week, Appellant was owed \$65.76 for each pay period commencing July 5, 2009. Id.

¹⁶ As previously noted, this amount owed Appellant was offset by the value of 60 hours of compensatory time mistakenly given Appellant and taken by Appellant. According to the County, the value of the 60 hours of compensatory time was calculated at Appellant's hourly rate of \$41.088 because Appellant received the leave when Appellant's hourly rate was \$41.088. County's Supplemental Submission, Affidavit of Ms. B at 1. Thus, the value of this leave was \$2,465.28. Id. Therefore, the County paid Appellant the difference between \$2,710.34 and \$2,465.28 which was \$245.06. See County's Response, Affidavit of the OHR Director II & Attach. 1; see also County's Supplemental Submission, Affidavit of Ms. B, Attach. 2.

received Appellant's retroactive longevity increment. See Email from Board staff to Assistant County Attorney, dated 05/19/11, subject: MSPB Case No. 11-27. The County agrees with the Board's assessment and indicates it owes Appellant \$166.04.¹⁷ County's Supplemental Submission, Affidavit of Ms. B at 2.

The Board notes that when the County paid Appellant for the additional 60 hours of annual leave owed Appellant because of its mistake in offsetting the 60 hours of compensatory leave a second time, it calculated the amount due Appellant at Appellant's hourly rate of \$41.088 instead of the hourly rate of \$41.910. See County's Supplemental Submission, Affidavit of Ms. B, Attach. 3. Therefore, the Board finds that the County owes Appellant an additional \$49.32¹⁸ for this leave.

Accordingly, based on the foregoing analysis, the Board finds that Appellant's final annual leave payout was incorrect and the County owes Appellant an additional \$215.36.

ORDER

Based on the foregoing analysis, the Board hereby orders the following:

1. The Board denies Appellant's appeal concerning the deduction of the 40 hours of furlough leave from Appellant's annual leave account;

2. The Board denies Appellant's appeal concerning Appellant's entitlement to 60 hours of compensatory leave;

3. The Board denies Appellant's appeal concerning Appellant's entitlement to 26 hours of compensatory leave;

4. The Board orders the County to pay Appellant an additional \$65.76 for Appellant's retroactive service increment;

5. The Board orders the County to pay Appellant an additional \$215.36 for Appellant's annual leave; and

6. The Board denies the County's request to order Appellant to reimburse the County for \$2,233.43.

¹⁷ This amount was derived by calculating the difference between Appellant's former rate of \$41.088 an hour and Appellant's rate with the longevity increment of \$41.910 an hour. The difference - \$0.822 an hour - was multiplied by 202 to arrive at \$166.04.

¹⁸ This amount was derived by multiplying the difference between the two hourly rates of pay of \$0.822, see supra note 17, by 60 to arrive at \$49.32.

DISMISSAL OF APPEALS

The County's Administrative Procedures Act (APA), Montgomery County Code, Section 2A-8(J), provides that the Board may, as a sanction for unexcused delays or obstructions to the prehearing or hearing process, dismiss an appeal. Section 35-7 of the Montgomery County Personnel Regulations allows the Board to dismiss an appeal if the appellant fails to prosecute an appeal or fails to comply with a Board order or rule.

The Board also may dismiss an appeal if it lacks jurisdiction over the appeal, if the case becomes moot or if the employee fails to exhaust administrative remedies.

During FY2011, the Board issued the following dismissal decision.

DISMISSAL FOR LACK OF JURISDICTION

CASE NO. 11-08

FINAL DECISION AND ORDER

This is the final decision of the Montgomery County Merit System Protection Board (MSPB or Board) on Appellant's appeal from the determination of the Montgomery County, Maryland Chief Administrative Officer (CAO) to deny Appellant's grievance concerning wage compression/pay inequity based on a finding that it was untimely. The County filed its response (County's Response) to the appeal on December 28, 2010. Appellant was provided the opportunity to file a reply to the County's Response but did not do so.

FINDINGS OF FACT

Appellant has been employed by the Department of Correction and Rehabilitation (DOCR) for twenty-five years and has been a Lieutenant for the last nine years. See Appeal Form, Attachment (Attach.) 2, Appellant's Grievance Form.¹ The genesis of Appellant's grievance dates back to events that occurred in 2005. County's Response, Attach. 4. In a memorandum dated April 14, 2005, the Office of Human Resources (OHR) Director informed the Director of the Department of Correction and Rehabilitation (DOCR) and the President of the Municipal and County Government Employees Organization (MCGEO) that the OHR Director was establishing the new class of Correctional Supervisor – Sergeant, Grade 22, and reallocating the position of Correctional Shift Commander – Lieutenant from Grade 22 to Grade 24.² Id. The effective date of this decision was April 17, 2005. Id.

The County subsequently created forty-four Sergeant positions. County's Response, Attach. 4. DOCR conducted a promotional process and the entire class of Master Correctional Officers (MCOs) applied and was selected for the Sergeant positions. Id. On June 12, 2005, DOCR promoted the MCOs to the rank of Sergeant. Id. As the new Sergeant class was more than two grades above the MCO class, pursuant to a provision of the MCGEO contract, all selectees received a 10% increase in salary. Id.

¹ The County filed a copy of Appellant's Grievance Form as Attachment 1 to its response.

² Prior to the establishment of the new occupational class, the Correctional Officer occupation consisted of three non-supervisory classes (Correctional Officers I, II & III), one lead work class (Master Correctional Officers), and two supervisory classes (Correctional Shift Commanders, also known as Lieutenants, and Correctional Team Leaders, also known as Captains). The Master Correctional Officer (MCO) class was assigned to Grade 19 and the Lieutenant class was assigned to Grade 22. See MSPB Case No. 06-03.

Thereafter, DOCR promoted four of the new Sergeants to the rank of Lieutenant, Grade C-1. County's Response, Attach. 4. According to the County, each of these employees received a ten percent increase upon promotion to the rank of Lieutenant. Id. Based on these promotions, some of the more senior Lieutenants in DOCR were making less than some newer Lieutenants. Id. Previously, MCOs moved directly to the rank of Lieutenant and received a ten percent raise. Id. The more senior Lieutenants did not go through the additional rank of Sergeant and thus did not receive the Sergeant pay increase granted to the four newly promoted Lieutenants. Id.

As a result of these personnel actions, fourteen Lieutenants in DOCR filed individual grievances on July 5, 2005, alleging that the June 12, 2005 promotion of employees with the rank of Master Correctional Officer to a rank of Sergeant with a ten percent pay increase for the new Sergeants improperly compressed the salary difference between them and the Lieutenants. County's Response at 3; see also MSPB Case 06-03 (2006). Eleven of the Lieutenants were represented by the Law Firm. Id. Three other grievances were filed pro se by Lt. A, Lt. B and Appellant. Id. Subsequently, the OHR Director consolidated all fourteen grievances for processing. Id.; County's Response, Attach. 8.

On August 23, 2005, the OHR Director responded to the consolidated grievances. County's Response at 3 & Attach. 9; see also MSPB Case 06-03 (2006). The OHR Director found that the establishment of a new Sergeant class, which had the effect of narrowing the salary spread between the Lieutenants and the newly promoted Sergeants, did not constitute a pay inequity and denied the relief requested. Id. The OHR Director informed the grievants that they had 5 calendar days to appeal this decision to the CAO. Id.

The eleven Lieutenants represented by the Law Firm appealed the OHR Director's determination to the CAO. MSPB Case No. 06-03; County's Response at 3. Appellant and the other pro se grievants did not do so. County's Response at 3. According to Appellant, Appellant chose not to pursue Appellant's grievance at the time as, during a meeting with the Warden at DOCR during that same time frame, Appellant was assured by the Warden that the County "was well aware of the issue and that when it was worked out the Warden was sure the rank of Lieutenant would be retroactively compensated."³ County's Response, Attach. 6. As Appellant was a Lieutenant at DOCR at the time, Appellant was sure that the County would include all of the Lieutenants eligible for retroactive compensation. Id. Therefore, Appellant declined to hire an outside lawyer to pursue Appellant's grievance. Id.

Subsequently, the eleven Lieutenants, through counsel, appealed their pay compression grievance to the Board. County's Response at 3; MSPB Case 06-03. The Board issued a decision, holding that the alleged pay compression did not violate any law or regulation and denied the grievance. Id. Seven of the eleven Lieutenants appealed through

³ As noted by the County, on appeal, Appellant has somewhat altered Appellant's version of this conversation, claiming now that "[a]t the time the Warden assured me that all eligible Lieutenants would be compensated if the ruling were in our favor whether or not I entered into the grievance of the eleven Lieutenants. Since I was assured the County knew of the compression issue why would I seek legal counsel needlessly." See Appeal Form.

counsel to the Circuit Court and thereafter to the Court of Special Appeals. County's Response at 3; see also Supplemental Final Decision, MSPB Case No. 06-03 (2010). The Court of Special Appeals reversed the Board's decision, finding that the Board had broad authority to resolve grievances even if there was no violation of law or regulation. Id.

Upon remand to the Board, the Board determined to correct the pay inequity for the seven Lieutenants who were part of the grievance appealed to the Board⁴ and who had subsequently appealed the Board's determination to the courts. See Supplemental Final Decision, MSPB Case No. 06-03. The Board issued its Supplemental Decision on April 26, 2010, ordering the County to retroactively correct the pay of the seven Lieutenants. Id.

According to Appellant, Appellant was unaware of the decision issued by the Board in April 2010 concerning the wage compression grievance. County's Response, Attach. 6. Sometime in September 2010, Appellant became aware of a rumor that some of the Lieutenants who were part of MSPB Case No. 06-03 had received retroactive compensation. Id. On September 22, 2010, Appellant, along with five other Lieutenants, filed a grievance concerning the fact that they had not been retroactively compensated for the pay inequity found by the Board in MSPB Case No. 06-03. County's Response, Attach. 1. OHR consolidated all six grievances under the caption Appellant, et al. County's Response, Attach. 2. On November 30, 2010, the OHR Director issued a final decision on the grievance, finding it was not timely. County's Response, Attach. 7.

This appeal followed.⁵

POSITIONS OF THE PARTIES

Appellant:

- Appellant was never informed about the Supplemental Final Decision in MSPB Case No. 06-03 when it was issued in April 2010.
- Appellant only heard a rumor about the Board's decision in September 2010. Once Appellant became knowledgeable about the decision, Appellant filed a grievance.
- Appellant was assured by the Warden that the County in 2005 was well aware of the issue of pay inequity and that when it was worked out, the Warden was sure the rank of Lieutenant would be retroactively compensated.

⁴ In its Supplemental Final Decision, the Board specifically declined to permit one of the Lieutenants, who was not part of the appeal filed with the Board, but who subsequently joined the law suit challenging the Board's Final Decision, to be a party to the remedy ordered by the Board. See Supplemental Final Decision, MSPB Case No. 06-03. The Board dismissed this Lieutenant as a party, holding that this Lieutenant had failed to exhaust the Lieutenant's administrative remedies. Id.

⁵ Although the OHR Director consolidated all six grievances, only Appellant filed with the Board, challenging the OHR Director's determination. Accordingly, the Board finds that the instant appeal is an individual one.

- As Appellant was a Lieutenant in 2005, Appellant was sure that the County would include all Lieutenants in any retroactive compensation. Therefore, Appellant declined to join those Lieutenants represented by counsel as Appellant did not want to have to pay anything out of pocket.
- The majority of Lieutenants in Appellant, et al. are senior to the majority of Lieutenants compensated in MSPB Case No. 06-03.

County:

- Appellant’s grievance of September 22, 2010 is duplicative of the individual grievance Appellant originally filed on July 5, 2005. At that time, Appellant did not pursue the grievance. Appellant should not be permitted to refile a grievance that is over the same matter which Appellant already grieved and then declined to pursue.
- The Board’s decision in MSPB Case No. 06-03 does not apply to Appellant. It does not even apply to the eleven grievants who originally filed with the Board; it only applies to the seven grievants who first came to the Board and then pursued their remedies in court.
- Appellant specifically declined to hire counsel and pursue Appellant’s remedies.
- The underlying events at issue in this case took place in June 2005, with the promotion of the MCOs to the rank of Sergeant. Therefore, the 30-day time period for filing a grievance on this matter began to run in June 2005. While Appellant filed a timely grievance at that time, Appellant declined to pursue it. Appellant is therefore foreclosed from filing an identical grievance in September 2010.
- It is hard to imagine that after the Board issued its Supplemental Final Decision on April 26, 2010, Appellant did not become aware of it until September 22, 2010, some five months later, when this case had been ongoing for almost five years.

APPLICABLE LAW AND REGULATION

Montgomery County Code, Chapter 33, Merit System Law, which states in applicable part,

Section 33-12. Appeals of disciplinary actions; grievance procedures.

- (b) **Grievances.** A grievance is a formal complaint arising out of a misunderstanding or disagreement between a merit system employee and supervisor with reference to a term or condition of employment. . .

Section 33-13. Appeal procedures.

The County Executive shall prescribe by personnel regulations, adopted under method (1) of section 2-A-15 of this Code, procedures covering appeals, including grievances which shall include the time limit for filing such appeal. . .

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005, and October 21, 2008), Section 34, *Grievances*, which states in applicable part:

34-9. Grievance procedure.

(a) *Time limit for filing a grievance.*

(1) A grievance may be dismissed by the OHR Director if it is not filed within 30 calendar days after:

(A) the date on which the employee knew or should have known of the occurrence or action on which the grievance is based; . . .

Montgomery County Personnel Regulations (MCPR), 2001 (as amended February 15, 2005),⁶ Section 34, *Grievances*, which states in applicable part:

34-9. Grievance procedure.

(e) *Steps of the grievance procedure.* The following table shows the 4 steps of the grievance procedure, the applicable time limits, and the responsibilities of the parties at each step.

STEPS OF THE GRIEVANCE PROCEDURE		
Step	Individual	Responsibility of Individual*
1	Employee	Present job-related problems to immediate supervisor.
		If unable to resolve the problem, submit a written grievance form to immediate supervisor within 20 calendar days.
		If the grievance is based on an action taken or not taken by OHR, submit the written grievance to the OHR Director.
	Supervisor	Give the employee a written response within 7 calendar days after the written grievance is received.
2	Employee	If not satisfied with the supervisor's response, may file the grievance with the department director within 5 calendar days after the supervisor's response is received.
	Department	Meet with the employee, employee's representative,

⁶ This was the grievance procedure in effect at the time Appellant filed Appellant's original grievance on pay inequity on July 5, 2005.

	Director	and other persons, as appropriate, to attempt to resolve the grievance.
		Give the employee a written response to the grievance within 15 calendar days after the grievance is received.
		If the grievance is based on an action taken or not taken by OHR, the OHR Director must give the employee a response within 15 calendar days after the grievance is received.
3	Employee	If not satisfied with the department director's response, may file the grievance with the CAO by submitting it to the Labor/Employee Relations Team of OHR within 10 calendar days after receiving the department's response.
	CAO's Designee	Must meet with the employee, employee's representative, and department director's designee within 35 calendar days to resolve the grievance.
	Employee and Dept. Director	Present information, arguments, and documents to the CAO's designee to support their position.
	CAO's Designee	If unable to resolve the grievance, must prepare a report of grievance findings, allow the parties 10 calendar days to comment on the findings, incorporate the parties' comments, if any, and provide the CAO with a report that includes background information, issue, the position and arguments of each party, a summary of relevant facts, and a recommended disposition.
	CAO	Must give the employee and department a written decision within 30 calendar days after the parties' comments on the report of grievance findings are received or 30 days after the deadline for comments on the report of grievance findings has passed.
4	Employee	If not satisfied with the CAO's response, may submit an appeal to the MSPB within 10 working days (10 calendar days for a uniformed fire/rescue employee) after the CAO's decision is received.
	MSPB	Must review the employee's appeal under Section 35 of these Regulations.
* At each step of the grievance procedure, the parties to a grievance should consider ADR methods to resolve the dispute.		

ISSUE

Is the County's determination that Appellant's grievance is untimely in accordance with applicable law and regulation?

ANALYSIS AND CONCLUSIONS

Appellant Failed To Exhaust Appellant's Administrative Remedies In 2005.

It is well established that an employee must pursue their administrative remedies and exhaust them. See, e.g., Public Service Commission v. Wilson, 389 Md. 27, 89, 882 A.2d 849, 886 (2005); Moose v. Fraternal Order of Police, 369 Md. 476, 486-87, 800 A.2d 790, 796-97 (2002); Montgomery County v. Broadcast Equities, Inc., 360 Md. 438, 452, 758 A.2d 995, 1002 (2000). Therefore, Appellant was required to pursue the various steps of the applicable administrative grievance procedure, and only then could Appellant file with the Board.

Appellant filed a timely grievance over pay inequity on July 5, 2005. County's Response, Attach. 8. The OHR Director issued a decision, rejecting Appellant's grievance. County's Response, Attach. 9. In the OHR Director's decision, the OHR Director specifically informed Appellant that Appellant could challenge the OHR Director's decision by raising it to the next step of the grievance procedure – i.e., to the Chief Administrative Officer. Id. Thus, Appellant was aware of what Appellant had to do to pursue Appellant's grievance. However, Appellant elected to do nothing.

Appellant seeks to argue that Appellant's failure to act was due to assurances by the Warden that the County was aware of the pay compression issue and that the Warden was sure the rank of Lieutenant would be retroactively compensated.⁷ According to Appellant, based on this assurance, Appellant chose not to act. Significantly, Appellant does not allege that the Warden counseled Appellant not to pursue Appellant's administrative remedies. Rather, the Warden informed Appellant that the County was aware of the issue and the Warden believed it would deal with it.

Accordingly, the Board finds that Appellant, like the Lieutenant dismissed as a party in the Supplemental Final Decision in MSPB Case No. 06-03, failed to exhaust Appellant's administrative remedies and, therefore, Appellant's appeal must be dismissed.

Appellant's Grievance Is Not Timely.

As an alternate ground for dismissal, the Board finds that Appellant's grievance is not timely. Appellant knew about the issue of pay inequity on July 5, 2005 when Appellant filed

⁷ Indeed, at the time the eleven Lieutenants raised their grievance to the Board, the County proposed adjusting the Lieutenants' pay based on a \$100 minimum separation based on seniority to address the perceived inequities. See Final Decision, MSPB Case No. 06-03; County's Response, Attach. 4 at 2.

Appellant's initial grievance on the matter. That grievance was timely filed but not pursued. The instant grievance, which arises over five years after the first and seeks to remedy the same pay inequity, is simply not timely.

ORDER

Based on the above, the Board denies Appellant's appeal on the basis of Appellant's failure to exhaust Appellant's administrative remedies. Alternatively, the Board denies Appellant's appeal on the basis of untimeliness.

RECONSIDERATION

There are two different types of requests for reconsideration that may be filed with the Board. The first, during the course of proceedings before the Board, is a request for the Board to reconsider a preliminary matter it has previously ruled upon prior to a Final Decision in the case. Such a request is filed pursuant to Montgomery County Code Section 2A-7(c) of the Administrative Procedures Act (APA). The Board's Hearing Procedures require that any preliminary reconsideration request be filed within five (5) calendar days from the date the ruling being challenged was received.

The second type of request for reconsideration that may be filed with the Board occurs after the Board has rendered a Final Decision in the matter. Pursuant to the APA, any such request for reconsideration must be filed within ten (10) days from a Final Decision. If not filed within this time frame, the Board may only approve a request for reconsideration in the case of fraud, mistake or irregularity. Pursuant to the APA, any decision on a request for reconsideration of the Board's Final Decision not granted within 10 days following receipt of the request shall be deemed denied.

Any request for reconsideration of a Final Decision stays the time for any administrative appeal pursuant to judicial review until such time as the request is denied or in the event such request is granted until a subsequent decision is rendered by the Board. However, a request for reconsideration does not stay the operation of any Board Order contained in the Final Decision unless the Board so determines.

In FY11, the Board issued two Reconsideration Decisions with regard to a Final Decision. Also during FY11, in the course of proceedings in one case, the Board issued two decisions on a request for reconsideration of a preliminary matter.

RECONSIDERATION REQUESTS **INVOLVING A PRELIMINARY MATTER**

CASE NO. 11-09

DECISION DENYING APPELLEE'S REQUEST FOR RECONSIDERATION

Appellants filed their appeal with the Merit System Protection Board (MSPB or Board) on January 4, 2011, challenging their terminations from employment, and named the County as the Appellee, along with various County officials.¹ The County subsequently filed a Motion to Dismiss, arguing it was not a proper party to this appeal. On February 3, 2011, the Board found that the County was not a proper party. See Decision on County's Motion to Dismiss and Appellants' Stay Request. Accordingly, the Board dismissed the County and its officials as parties to this case and substituted the Local Volunteer Fire Department (LVFD) as the Appellee. Id. The Board ordered LVFD to file its Prehearing Submission with the Board by February 28, 2011 and provided LVFD with a copy of the Board's Hearing Procedures. Id. On February 24, 2011, LVFD filed a pleading entitled: "Submission of Local Volunteer Fire Department, Inc. in Response to February 3, 2011 Decision and Order" (Submission). In this pleading, filed by its counsel,² LVFD disputes that it is a proper party to this appeal and asserts that all of the actions complained of by the Appellants were taken or directed by the County. Thus, LVFD is seeking, through its Submission, to have the Board reconsider its decision to dismiss the County as a party. Accordingly, the Board will treat Appellee's Submission as a Request for Reconsideration of a preliminary matter.

Pursuant to the Board's Hearing Procedures, any request for reconsideration of a Board decision on a preliminary matter must be made within five (5) calendar days of receipt of the Board's ruling. The Board sent its Decision on the County's Motion to Dismiss by first class mail, postage prepaid on February 3, 2011 to LVFD. It is reasonable to assume that LVFD, which is located in Montgomery County Maryland, received the Board's Decision within 5 calendar days from the date of issuance.³ Thus, any reconsideration request was due to the Board by no later than February 14, 2011. However, in the instant

¹ Appellants named the Fire Chief, the Director, Office of Human Resources (OHR), and the Director, Office of Management and Budget (OMB), as Appellees in this case.

² The Board notes that counsel for LVFD is the same counsel as for Appellants. As this is an inherent conflict of interest given the fact that if Appellants prevail on their appeal, LVFD will be ordered to reinstate them to their positions as employees of LVFD, see Maryland Rules of Professional Conduct, Rule 1.7 (Conflict of Interest: General Rule), the Board expects LVFD to substitute new counsel as it proceeds in this case.

³ The Board would note that Appellee bears the burden of proving its Request for Reconsideration was timely filed.

case, LVFD's Request for Reconsideration was not filed until February 24, 2011. Accordingly, the Board finds that the Request is untimely.

LVFD indicates that it agrees to the relief sought by the Appellants in this matter and requests that the Board immediately issue an Order staying the County's defunding of the administrative positions of Appellants and requiring the County to comply with the reduction-in-force (RIF) regulations in implementing any RIF.⁴ As the Board has dismissed the County as a party to this appeal, the Board denies LVFD's request.

Alternatively, LVFD requests that the Board issue a Final Order, based on its Decision on the County's Motion to Dismiss and Appellants' Stay Request, so as to permit an appeal to the Circuit Court. The Board denies this request, as it has not adjudicated Appellants' appeal on its merits.

Based on the foregoing, the Board denies the Appellee's Request for Reconsideration, as well as its request for a Final Order in this matter. LVFD is ordered to file its Prehearing Submission **by COB March 9, 2011**. Appellants are to file their Prehearing Submission **by COB March 31, 2011**.

⁴ Although LVFD seeks to have the Order cover all Local Fire and Rescue Departments, any relief ordered by the Board in this appeal may only extend to LVFD, which is a party to this appeal.

CASE NO. 11-09

DECISION DENYING APPELLANTS' REQUEST FOR RECONSIDERATION

On February 24, 2011, Appellants, A and B, filed a pleading entitled: "Submission of Appellant A and Appellant B in Response to February 3, 2011 Decision and Order" (Submission). In their Submission, Appellants challenged the determination by the Board to dismiss the County and its officials¹ as parties to this case and substitute Local Volunteer Fire Department (LVFD) as the Appellee in this case. Thus, the Appellants are seeking, through their Submission, to have the Board reconsider its decision. Accordingly, the Board will treat Appellants' submission as a Request for Reconsideration of a preliminary matter.

Pursuant to the Board's Hearing Procedures, a copy of which was provided to Appellants along with the Board's Decision on the County's Motion to Dismiss, any request for reconsideration of a Board decision on a preliminary matter must be made within five (5) calendar days from the date the ruling was received. The Board sent its Decision on the County's Motion to Dismiss by first class mail, postage prepaid on February 3, 2011, to Appellants' counsel. It is reasonable to assume that Appellants' counsel, who is located in Rockville, Maryland, received the Board's Decision within 5 calendar days from the date of issuance.² Thus, any Request for Reconsideration was due to the Board by no later than February 14, 2011. However, in the instant case, the Request for Reconsideration was not filed until February 24, 2011. Accordingly, the Board finds that the Request for Reconsideration is untimely.

Based on the foregoing, the Board denies the Appellants' Request for Reconsideration.

¹ Appellants named the Fire Chief, the Director, Office of Human Resources (OHR) and the Director, Office of Management and Budget (OMB) as Appellees in this case.

² The Board would note that Appellants bear the burden of proving their Request for Reconsideration was timely filed.

RECONSIDERATION REQUESTS **INVOLVING FINAL DECISIONS**

CASE NO. 10-19

DECISION ON COUNTY'S MOTION FOR RECONSIDERATION

On October 21, 2010, the County filed a Motion for Reconsideration (Motion), seeking to have the Merit System Protection Board (MSPB or Board) reconsider a portion of its Order in its Final Decision in the above-captioned case, dated October 12, 2010.¹ Specifically, the County seeks to have the Board amend its Order, which ordered Appellant be reinstated to the position Appellant held at the time Appellant was terminated, arguing that it is not in compliance with Section 33-14(c)(4) of the County Code. Appellant did not file any response to the County's Motion.

As the record of evidence clearly established, at the time Appellant was terminated, Appellant was an Administrative Aide in the Department of Transportation (DOT). Hearing Transcript (H.T.) at 24, 31, 33, 98. Although Appellant was on detail to MC311, Appellant had not been officially transferred there. *Id.* at 31, 86. Rather, the record of evidence established that Appellant remained an employee with DOT, which was why the Notice of Termination was issued by the Director, DOT. *Id.* at 98.

Section 33-14 of the Montgomery Code provides in applicable part:

- (c) **Decisions.** Final decisions by the Board shall be in writing, setting forth necessary findings of fact and conclusions of law. A copy of such decision shall be furnished to all parties. The Board shall have authority to order appropriate relief to accomplish the remedial objectives of this article, including but not limited to the following:
 - (4) Order reinstatement with or without back pay, although the Chief Administrative Officer may reinstate either to a position previously held or to a comparable position of equal pay, status and responsibility.

As is evident from the clear language of the statute, the Board has the authority to order reinstatement. The statute also provides the Chief Administrative Officer with certain discretion as to the reinstatement once the Board acts. The Board exercised its prerogative under the statute to order Appellant's reinstatement with back pay to the position Appellant

¹ Pursuant to Section 2A-10(f) of the Administrative Procedures Act, any request for reconsideration is to be filed within ten days from a Final Decision. The Board has ten days from receipt of the request to grant or deny the request.

held at the time Appellant was terminated. As this order was within the statutory mandate provided to the Board, the Board finds there is no need to amend its Order, as it complies with the Board's authority under the statute.

CASE NO. 11-03

DECISION ON APPELLANT'S MOTION FOR RECONSIDERATION

On December 9, 2010, Appellant A filed a Motion for Reconsideration (Reconsideration Request) seeking to have the Merit System Protection Board (MSPB or Board) reconsider a portion of its Final Decision in the above-captioned case, dated November 30, 2010.¹ Specifically, Appellant A seeks to have the Board amend its Final Decision to state that Mr. X was survived by three minor children.² Reconsideration Request at 2. The County did not file any response to Appellant A's Reconsideration Request.

Mr. X began his employment with the County as a Firefighter on November 13, 1980. He participated in the Employees' Retirement System (ERS) as a Group G member. Mr. X died on April 17, 2010 as a result of arteriosclerotic cardiovascular disease while on a camping trip in West Virginia. See Appellant A's Reply, Ex. 3.

On August 16, 2010, the Chief Administrative Officer (CAO) sent a letter to Appellant A, who had been married to Mr. X since July 26, 2003, Appellant A's Reply, Ex. 2 ¶ 2, explaining why the CAO did not consider Mr. X's death to be service-related under County Code Section 33-46 so as to entitle Appellant A to service-connected death benefits. Specifically, the CAO indicated that although the cause of Mr. X's death was arteriosclerotic cardiovascular disease, his disease was the result of his smoking and not his County service as a Firefighter. The CAO explained that in order to determine if a death is service-related, the County uses as guidance the criteria used to determine a service-connected disability. While acknowledging that Mr. X had completed a tobacco cessation program in 2000, the CAO noted that Mr. X's medical records indicated that he continued to smoke. The CAO concluded that the continued use of tobacco products by Mr. X after completing a tobacco cessation program constituted "willful negligence" on his part. Appellant A, upon learning of the CAO's determination, filed an appeal with the Board.

The CAO also sent a letter on August 16, 2010 to Appellant B, Mr. X's ex-wife, see Appellant A's Reply at 1, explaining why the CAO did not consider Mr. X's death to be service-related under County Code Section 33-46 so as to entitle Appellant B's two minor sons by Mr. X, child A and child B, to service-connected death benefits. Appellant B also

¹ Pursuant to Section 2A-10(f) of the Administrative Procedures Act, any request for reconsideration is to be filed within ten days from a Final Decision. The Board has ten days from receipt of the request to grant or deny the request.

² The Final Decision indicates that Mr. X left two minor sons, child A and child B, and a surviving spouse, Appellant A. Final Decision at 2.

filed an appeal to the Board on behalf of her two minor sons from the CAO's determination.

The Board issued Final Decisions, sustaining the appeals of both Appellant A and Appellant B, on behalf of Appellant B's minor children. In Appellant A's Final Decision, the Board ordered the County to pay service-connected benefits to Appellant A. Appellant A now seeks to have the record reflect that Mr. X was survived by a third son, child C, a minor child of Appellant A and Mr. X. Appellant A's Reconsideration Request at 1.

Significantly, on appeal, both Appellant A and Appellant B, on behalf of Appellant B's two minor children, child A and child B, were represented by the same counsel. Appellant A's counsel filed a joint pleading on behalf of both Appellants with the Board (Reply). As part of the Reply, Appellant A's counsel included a Declaration from Appellant A. Nowhere in the Declaration is there any mention that Appellant A had a child with Mr. X during their marriage.

Thus, at the time the Board decided the appeals of Appellant A and Appellant B on behalf of Appellant B's two minor children, there was no evidence in the record to suggest that Appellant A had a minor child. Appellant's counsel now belatedly cites to a form in the record from the Office of the Chief Medical Examiner for the State of West Virginia to support the contention that Mr. X was survived by a third son, child C, whose mother is Appellant A. Appellant A's Request for Reconsideration at 1-2. However, that form does not support this contention. What the form indicates on page three is the following: "Family/Social: ex-wife, new wife, 3 children." Appellant A's Reply, Ex. 3. There is no information in the record to indicate how the information on this form was derived, much less whether it is accurate.

Accordingly, based on the foregoing analysis, the Board declines to reconsider its Final Decision in this matter.

MOTIONS

The County's Administrative Procedures Act (APA), Montgomery County Code, Section 2A-7(b), provides for a variety of motions to be filed on various preliminary matters. Such motions may include motions to dismiss the charges because of some procedural error, motions to dismiss a party and substitute another, motions to quash subpoenas, motions in limine (which are motions to exclude evidence from a proceeding), and motions to call witnesses or submit exhibits not contained in a party's Prehearing Submission. Motions may be filed at any time during a proceeding. The opposing party is given five (5) calendar days to respond. The Board may issue a written decision on the matter or may, at the Prehearing Conference or the beginning or end of the hearing, rule on the motion.

During FY11, the Board issued the following decisions on various motions filed during the course of appeal proceedings.

MOTION TO DISMISS A PARTY

CASE NO. 11-09

CASE NO. 11-23

DECISION ON THE COUNTY'S MOTION TO DISMISS AND APPELLANTS' STAY REQUEST AND ORDER

PROCEDURAL HISTORY

On January 4, 2011, Appellants filed an appeal with the Merit System Protection Board (MSPB or Board), challenging the County's action¹ in defunding and thus purportedly forcing the elimination of all administrative staff positions of the Local Fire and Rescue Departments (LFRDs), to include Appellants' positions² with the Local Volunteer Fire Department (LVFD). Appellants asserted that the County's defunding action was in retaliation for the LFRDs and their employees advocating against an ambulance fee, previously enacted by the County and then put on an electoral referendum, where it was defeated. Appeal Memorandum at 7. Appellants also alleged that they are County merit system employees, entitled to the protections of the County's Personnel Regulations. *Id.* at 2. In their appeal, Appellants requested that the Board stay the defunding of the LFRD administrative staff positions and the Fire Chief's reduction-in-force directives to the LFRDs pending an adjudication of Appellants' appeal on the merits. *Id.* at 17-18.

On January 5, 2011, the Board ordered the County to respond to the stay request by COB on January 12, 2011. The County responded on January 11, 2011, opposing the stay request and moving to dismiss the case.³ *See* County's Motion to Dismiss. The County argued that pursuant to statute, Appellants, like all LFRD employees, are not County employees. *Id.* at 1. Therefore, while the County may choose not to provide certain funds to the LVFD to support Appellants' positions, it is LVFD that must determine what action it will take because of this loss of funding. *Id.* The County argued that LVFD, which has

¹ The caption of the instant appeal indicated it was against the County, the Fire Chief, the Director, Office of Human Resources (OHR), and the Director, Office of Management and Budget (OMB). The appeal consisted of a memorandum setting forth arguments on behalf of the appeal and a request for a stay (hereinafter Appeal Memorandum), as well as fourteen exhibits (hereinafter Appellants' Exhibits 1-14).

² Appellant A is an Administrative Specialist with LVFD. Appeal Memorandum at 13. Appellant B is an Office Services Coordinator. *Id.*

³ Although the County indicated in its pleading it wanted the case dismissed, *see* County's Motion to Dismiss at 1, it indicated subsequently that it was in fact seeking to dismiss the County, the Fire Chief, the OHR Director, and the OMB Director as parties to this appeal. County's Motion to Dismiss at 2.

available funds⁴ to pay Appellants' salaries, could choose to continue Appellants in their positions or choose to terminate Appellants by reduction-in-force procedures. Id.

On January 11, 2011, Appellants filed another appeal, together with copies of their Termination Notice – Reduction-In-Force. This appeal was assigned MSPB Case No. 11-23. Appellants also filed a Revised Memorandum of Law in Support of Appeal, a Request for Hearing on Issuance of Immediate Stay, and a Motion to Consolidate MSPB Case No. 11-23 with MSPB Case No. 11-09.⁵

Appellants replied to the County's Motion to Dismiss on January 18, 2011, asserting that it was the County, not LVFD, which eliminated Appellants' positions and therefore must answer for its personnel actions. Appellants' Opposition to Montgomery County's Motion to Dismiss (Appellants' Opposition) at 4. Appellants also submitted a Supplemental Filing in Opposition to Montgomery County's Motion to Dismiss on January 18, 2011 (Appellants' Supplemental Opposition).

On January 19, 2011, the County asked for an extension of time until January 25, 2011 to file a reply to Appellants' Oppositions. See Email from Assistant County Attorney to Appellants' counsel and the Board's staff member, subject: County Reply to Oppositions to Motion to Dismiss. Appellants opposed any extension. See Email from Appellants' counsel to Assistant County Attorney and the Board's staff member, dated 01/19/11, subject: RE: County Reply to Oppositions to Motion to Dismiss. The Board's staff member informed the parties that the Board would grant a limited extension until COB January 24, 2011 for the County to file a response to Appellants' Oppositions. The Board's staff member informed the parties that, after this deadline, the Board would accept no more pleadings on the issues of a stay for Appellants and the County's Motion to Dismiss. See Email from the Board's staff member to Appellants' counsel and the Assistant County Attorney, dated 01/19/11, subject: RE: County Reply to Oppositions to Motion to Dismiss.

On January 24, 2011, Appellants filed their Submission of Additional Exhibits in Support of Appeals and Request for Stay, along with Appellants' Exhibits 16-45. They also filed Exhibit B-1 to their Opposition to Motion to Dismiss. On the same day, the County filed its Reply to Appellants' Opposition to Motion to Dismiss and Appellants' Supplemental Filing with Exhibits 5-16 (County's Reply).

Despite having been told that no more pleadings would be accepted on the issues of a stay for Appellants and the County's Motion to Dismiss, Appellants filed an email response to the County's Reply. See Email from Appellants' counsel to Assistant County Attorney and the Board's staff member, subject: RE: MSPB Service of Pleadings Appeal Nos. 11-09 and 11-23. The County filed a response to Appellants' email. See Email from Assistant

⁴ The County submitted as an exhibit to its Motion to Dismiss the LVFD's IRS Form 990 filing for 2008. That filing showed that the LVFD had \$6,596,919.00 in assets. See County's Motion to Dismiss, Exhibit (Ex.) 3.

⁵ On January 25, 2011, the Board granted Appellants' Motion to Consolidate and consolidated the two cases under MSPB Case No. 11-09.

County Attorney to Appellants' counsel and the Board's staff member, subject: RE: MSPB Service of Pleadings Appeal Nos. 11-09 and 11-23 with an attachment labeled LFRD Exhibits.pdf.

On January 28, 2011, Appellants filed a Second Submission of Additional Exhibits in Support of Appeals and Request for Stay, with Appellants' Exhibits 46 and 47 attached.

Because the Board made it clear to the parties that it would accept no more pleadings on the issues of a stay and the County's Motion to Dismiss after January 24, 2011, it hereby strikes all additional pleadings from the record. This Decision is based on all pleadings up to and including those filed on January 24, 2011 by the parties.

FINDINGS OF FACT

The Montgomery County Fire and Rescue Service (MCFRS), which includes the local fire and rescue departments, is charged with the delivery of fire, rescue and emergency services for the County. LVFD is one of the LFRDs, providing fire and rescue services to a designated area of the County. LVFD is Appellants' employer. See Appeal Memorandum at 3. Indeed, LVFD has previously acknowledged that as an independent corporate entity it retains the right to hire and fire its own employees. See County's Reply at 2, County Ex. 6 at 185. However, LFRD employees are paid with County tax funds. Montgomery County Code, Section 21-16(a). Nevertheless, they are members of a separate merit system governed by generally applicable County personnel regulations. Id.; see MSPB Case Nos. 10-02, 10-08, 10-20.

On October 5, 2010, the County Executive transmitted an FY11 Savings Plan to address the potential loss of revenue in FY11 of over \$14.1 million if the referendum on the County's Emergency Medical Services Transport Fee (ambulance fee) was successful in defeating the imposition of the fee. See Appellants' Ex. 12. The savings plan called for eliminating the funding for twenty LFRD positions and replacing them with five County positions.⁶ Id. The referendum did, in fact, result in the defeat of the ambulance fee. Appellants' Ex. 40. Subsequently, on December 2, 2010, the County Executive transmitted a revised FY11 Savings Plan to the Council which continued to include the elimination of funding for the LFRD positions as well as the Volunteer Recruiter. Appellants' Ex. 9. On December 14, 2010, the County Council adopted the County Executive's recommendation to eliminate funding for twenty LFRD administrative positions and the Volunteer Recruiter position. Appellants' Ex. 13.

Subsequently, on December 16, 2010, the Fire Chief emailed the various LFRD Presidents a letter, indicating that the Council's action on December 14, 2010 would impact the funding for LFRD employee positions. Appellants' Ex. 5. The Fire Chief counseled the LFRD Presidents that they would have to immediately determine whether they would retain

⁶ The savings plan also call for the elimination of a County employee position, Volunteer Recruiter, in the Division of Volunteer Services, MCFRS. Appellants' Ex. 12.

their administrative employees or effect a reduction-in-force (RIF). Id. If the LFRDs chose to pursue a RIF action, they were advised that they had to follow Section 30 of the Montgomery County Personnel Regulations (MCPR).⁷ Id. The Fire Chief also indicated that as of December 31, 2010, the LFRD employees would no longer be paid by Montgomery County. Id.

On December 23, 2010, OHR held a meeting with the LFRD Presidents to explain their obligations under the MCPR, should the LFRDs elect not to fund their administrative staff positions. County's Motion to Dismiss, Ex. 1 & Attach. 1. The briefing package included a sample Notice of Intent – Reduction-In-Force⁸ and Termination Notice – Reduction-In-Force. Appellants' Ex. 6. The briefing package indicated that LFRDs "first need to decide whether or not they intend to implement a RIF." Id. at 5. The LFRDs were informed that if they chose to implement a RIF, they had to issue a Notice of Intent to each employee and then a written notice of termination at least 30 days before the employee was to be terminated. Id. at 6.

LVFD's President issued Notices of Intent – Reduction-In-Force to Appellants, Appellants' Ex. 7a and Ex. 7b, on December 28, 2010.⁹ Appeal Memorandum at 5. The LVFD President noted that the County was extending Appellants' pay for forty-four days, from December 28, 2010 until their termination on February 11, 2011.¹⁰ Id.

This appeal followed. On January 6, 2011, the Board's staff member acknowledged the receipt of Appellants' appeal and requested their counsel provide the Board with a copy of their Termination Notices. See Letter from the Board's staff member to Appellants' counsel, subject: MSPB Case No. 11-09. Once these documents were provided, Appellants' counsel was advised that the Board would begin processing the consolidated appeals. Id.

On January 11, 2011, Appellants filed a new appeal (Appeal Memorandum II) and included as exhibits their Termination Notices, Appellants' Ex. 15a and Ex. 15b. As

⁷ The Board notes that this guidance was in accord with the Board's decision in MSPB Case No. 10-08 (2010), involving the abolishment of an administrative employee's position at an LFRD. In MSPB Case No. 10-08, the Board ruled that the LFRDs had to follow the MCPR RIF procedures and directed that OHR assist them in doing so.

⁸ The Board notes that in MSPB Case No. 10-08, the Board held that, henceforth, LFRDs had to issue a Notice of Intent before issuance of the actual RIF Termination Notice.

⁹ Subsequently, a revised Notice of Intent was issued by the LVFD President to Appellants, Appellants' Ex. 8a and Ex. 8b.

¹⁰ The Board notes that the forty-four day extension would permit Appellants to receive a Notice of Intent two weeks prior to the issuance of the Termination Notice, as was the County practice, see Appellants' Ex. 6 at 6. It would also keep Appellants in a paid status during the thirty-day period required under the MCPR before effecting their terminations due to RIF.

previously noted, the Board combined the new appeal, MSPB Case No. 11-23, with the original appeal in this matter, MSPB Case No. 11-09.

POSITIONS OF THE PARTIES

Appellants:

- Appellants are County merit system employees, subject to the MCPR.
- Under the applicable provisions of the MCPR, Department Directors and the OHR Director have certain responsibilities with regard to reduction-in-force. They have not met these responsibilities.
- The County's action in defunding the LFRD administrative positions was retaliation for the LFRDs and their employees advocating against the ambulance fee legislation that was an electoral referendum question.
- The abolishment of 100% of the LFRD administrative personnel, while subjecting no one else in similar administrative positions in MCFRS to RIF procedures, is contrary to the personnel regulations.
- Appellants face an imminent and irreparable harm for which there is no adequate remedy at law available. Therefore, the Board should stay the RIF of all LFRD administrative personnel.

County:

- Appellants have ignored the statute which specifically states that LFRD employees are not County employees but are part of a separate merit system.
- The MSPB has previously affirmed in several decisions that LFRD employees are not County employees.
- Although the County chose not to provide funding for Appellants' positions, LVFD was free to use some of the approximately \$6,596,919 it has in assets for funding Appellants' positions.
- While the County provided guidance to the LFRDs with regard to the procedure to follow should they choose to RIF the LFRD administrative employees, it did not mandate that LVFD terminate Appellants through RIF.
- MCFRS recommended the elimination of funding for LFRD administrative staff several years prior (i.e., in 2002 and 2008) to Appellants' activities advocating the defeat of the ambulance fee. Therefore, since MCFRS' attempts to eliminate funding for LFRD administrative staff predate Appellants' ambulance fee activity, no nexus between their advocacy concerning the ambulance fee vote and the County's decision to eliminate funding can be established.¹¹

¹¹ As the Board has determined that the County is not a proper party to this case, the Board does not need to address this issue on the merits. However, the Board does find that, as the County has pointed out, there have been several attempts previous to 2010 to eliminate LFRD administrative positions. See, e.g., County Ex. 6. Indeed, the Board decided the appeal of one LFRD administrative employee whose position was eliminated due to a lack of funding in 2008. See MSPB Case No. 10-08.

APPLICABLE LAW

Montgomery County Code, Section 21-3, *Fire Chief; Division Chiefs*, which states in applicable part:

- (g) In addition to any other authority under this Chapter, the Fire Chief may take disciplinary action against any employee or volunteer in the Service, including those in a local fire and rescue department, for violating any County law, regulation, policy, or procedure, or any lawful order of the Chief or the Chief's designee. Disciplinary action under this subsection may include suspension or discharge of an employee and restriction or prohibition of a volunteer from participation in fire and rescue activities. The Chief must not take any action involving an employee or volunteer of a local department, except when the Chief finds that immediate action is required to protect the safety of the public or any employee or volunteer, unless the Chief finds that the local department has not satisfactorily resolved the problem in a timely and effective manner. Any finding by the Chief under the preceding sentence is not subject to appeal. Each employee or volunteer must give the Chief any information, not otherwise legally privileged, that the Chief reasonably needs to administer this Chapter.

Montgomery County Code, Section 21-16, *Personnel administration for local fire and rescue departments*, which states in applicable part:

- (a) **Applicability of County Regulations.** Employees of local fire and rescue departments who are paid with tax funds are not County employees. They are members of a separate merit system governed by generally applicable County personnel regulations except as expressly modified by regulations that the County Executive, after receiving Commission approval under Section 21-2(d)(4), adopts under method (2).
- (b) **Personnel services.** The Office of Human Resources must provide the following services to the local fire and rescue departments:
 - (1) Uniform administration and application of personnel regulations and policies.
 - (2) Consistent administration and application of a uniform pay plan and benefit program, which must be substantially equivalent to that of the County government.
 - (3) Disbursement of salaries and wages, including withholding for taxes and fringe benefits through the County's payroll system.

- (4) Review for consistency with applicable personnel regulations all personnel transactions involving employees of local fire and rescue departments paid with tax funds.
 - (5) Use of the Merit System Protection Board.
- (c) Limitations. Nothing in this Chapter means that employees of the local fire and rescue departments are County employees, either on a de jure or de facto basis. Nothing in this Chapter abrogates the authority of each local fire and rescue department over such functions as hiring, promotion, discipline, and discharge of employees of that department; the assignment of administrative staff; and day-to-day assignments of volunteer personnel at that department. This Section does not diminish the authority of County government to act under Sections 21-13 and 21-14 or the authority of the Fire Chief to discipline an employee or volunteer of a local fire and rescue department as provided in Section 21-3(g).

ISSUES

1. Is the County correct that it is not a proper party to this appeal?
2. Have Appellants established irreparable harm so as to warrant the Board staying their termination?

ANALYSIS AND CONCLUSIONS

The Board Originally Lacked Jurisdiction Over Appellants' Appeal At The Time They Filed It; Since Then, An Appealable Action Has Occurred To Vest The Board With Jurisdiction.

When Appellants filed their original appeal, they only filed their Notices of Intent. Appellants' Exs. 8a & 8b. Only after the Board's staff requested Appellants provide copies of their Termination Notice, so that the Board could begin processing their appeal, did the Board receive these documents. Appellants' Exs. 15a & 15b.

The Board would note that the Board's jurisdiction is not plenary but is rather limited to that which is granted it by statute or regulation. See, e.g., King v. Jerome, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit System Protection Board's jurisdiction is only over those actions which were specifically provided for by some law, rule or regulation); Monser v. Dep't of Army, 67 M.S.P.R. 477, 479 (1995). As a limited jurisdiction tribunal whose jurisdiction is derived from statute or regulation, the Board is obligated to ensure it has jurisdiction over the action before it. Schwartz v. USPS, 68 M.S.P.R. 142, 144-45 (1995). The Board only has jurisdiction over removal, demotion, and suspension actions, as well as other disciplinary actions. See Montgomery County Code, Section 33-12(a). The Board also has jurisdiction over grievances after an adverse decision by the Chief Administrative Officer

and involuntary resignations. Montgomery County Code, Section 33-12(b). Thus, until such time as Appellants were able to provide an actual Termination Notice – Reduction-In-Force, the Board lacked jurisdiction to hear their appeal. As Appellants have subsequently produced the required Termination Notices, the Board is now vested with jurisdiction to adjudicate their appeal.

Pursuant to Section 21-16 of the County Code, Appellants Are Not County Employees. Therefore, The Board Grants The County’s Motion To Dismiss The County As A Party To The Instant Appeal.

In order to resolve this matter, it is necessary to look to the applicable statutory provisions enacted by the County Council which govern LFRD employees. It is well established that the cardinal rule of statutory construction is to “ascertain and effectuate the intent of the Legislature” which, in this case, is the County Council. Mayor and Town Council of Oakland v. Mayor and Town Council of Mountain Lake Park, 392 Md. 301, 316, 896 A.2d 1036, 1045 (2006); Chow v. State, 393 Md. 431, 443, 903 A.2d 388, 395 (2006); Moore v. State, 388 Md. 446, 452, 879 A.2d 1111, 1114 (2005). In ascertaining legislative intent, the Board will examine the plain language of the statute and if the plain language is unambiguous and consistent with the statute’s apparent purpose, the Board will give effect to the statute as written. Mayor and Town of Oakland, 392 Md. at 316, 896 A.2d at 1045; Piper Rudnick v. Hartz, 386 Md. 201, 218, 872 A.2d 58, 68 (2005). In performing this review, the rule is that the “Legislature is presumed to have meant what it said and said what it meant.” Witte v. Azarian, 369 Md. 518, 525, 801 A.2d 160, 165 (2002); Walzer v. Osborne, 395 Md. 563, 572, 911 A.2d 427, 432 (2006). If the words of a statute are clear and unambiguous, then the Board need not look beyond the statute in order to determine the Council’s intent. Marriott Employees Federal Credit Union v. MVA, 346 Md. 437, 445, 697 A.2d 455, 458 (1997); Walzer, 395 Md. at 572, 911 A.2d at 432. Rather, if the words of the statute are clear, unambiguous and express a plain meaning, the Board will give effect to the statute as written. Jones v. State, 336 Md. 255, 261, 647 A.2d 1204, 1206-07 (1994); Walzer, 395 Md. at 572, 911 A.2d at 432. As the Court of Appeals for Maryland has counseled, the Board should “neither add nor delete words to a clear and unambiguous statute to give it a meaning not reflected by the words the Legislature used or engage in forced or subtle interpretation in an attempt to extend or limit the statute’s meaning.” Taylor v. Nations-Bank, N.A., 365 Md. 166, 181, 776 A.2d 645, 654 (2001); Walzer, 395 Md. at 572, 911 A.2d at 432; see Chow, 393 Md. at 444, 903 A.2d at 395.

The applicable statutory provisions governing LFRD employees are found at Section 21-16 of the County Code and have been previously set forth above. The Board finds that the statutory provisions are quite clear and unambiguous. LFRD employees “are not County employees” but rather members of a separate merit system. They are governed by “generally applicable County personnel regulations”.¹² While it is true that the County’s Office of

¹² Appellants have made much ado about the fact that the LVFD President does not occupy the position of a Department Director and therefore does not have the power to implement the RIF procedures for LVFD. See Appeal Memorandum II at 5; Appeal Memorandum at 5. What Appellants ignore is that the statute provides that the MCPR is

Human Resources must provide certain personnel services to the LFRDs, “[n]othing in this [statute] means that employees of the local fire and rescue departments are County employees, either on a de jure or de facto basis.” It is absolutely clear from the statute that the Council, even though extending certain “County” policies and benefits to LFRD employees, fully intended not to make LFRD employees County employees. See also MSPB Case Nos. 10-02, 10-08, 10-20.¹³

While Appellants have submitted certain exhibits to support their contention that they are actually County merit system employees, the exhibits prove nothing. For example, Appellants submitted their pay stubs, showing they are paid by the County. Appellants’ Ex. 1. However, the County Code specifically provides that they are paid by County tax funds. Montgomery County Code, Section 21-6(a). Moreover, the County Code specifically provides that they will be paid their salaries, including withholding for taxes and fringe benefits, through the County’s payroll system. Montgomery County Code, Section 21-16(b)(3).

Appellants have also submitted a document entitled “Oracle Self Service Human Resources: My Information”. See Appellants’ Supplemental Filing in Opposition to the County’s Motion to Dismiss, Appellants’ Ex. B. The document shows that Appellant A’s Department is the FRS – LVFD. Id. It also shows that the Manager is Mr. C. Id. Mr. C is the Division Chief, Volunteer Services Division. Appellants’ Supplemental Opposition at 1. Volunteer Services Division is responsible for promoting the integration of the activities of career and volunteer firefighters and rescuers and assisting the LFRDs with such matters as training, apparatus use and maintenance and budget submission. See MCFRS website available at <http://www.montgomerycountymd.gov/firtmpl.asp?url=/content/firerescue/dovs/index.asp>. The Board finds that this simply demonstrates OHR’s adherence to the County Code’s command that there be uniform application of personnel policies to the LFRD employees. Montgomery County Code Section 21-16(b)(1). As this is a County Human Resource (HR) system, it is reasonable that the County used a County employee in the manager section of the form instead of an independent corporation’s President. As the Council made absolutely clear in the County Code, the extension of HR policies to LFRD employees does not make them either de jure or de facto County employees. Montgomery County Code, Section 21-16(c).

Significantly, the statute makes clear that nothing therein abrogates the authority of LVFD to hire and discharge its employees. Montgomery County Code, Section 21-16(c). Thus, the Board finds that when the County chose to defund Appellants’ positions, LVFD

“generally” applicable. The Board finds that the LVFD President, as head of the LVFD, occupies a position that is equivalent to a Department Director in the MCPR. Therefore, the LVFD President has full authority to implement a RIF action against the Appellants, so long as it is in accord with the procedures set forth in the MCPR.

¹³ While the County correctly noted that the Board has ruled in previous cases that LFRD administrative staff employees are not County employees, it incorrectly cited to MSPB Case No. 10-12 instead of MSPB Case No. 10-20 or 10-08. See County’s Reply at 1.

was free to retain Appellants' services by utilizing its own corporate funds to pay their salaries. Indeed, the County pointed out to LVFD, during its December 23, 2010 briefing, that it was up to LVFD to decide whether it would terminate Appellants.¹⁴ See Appellants' Ex. 6 at 5.

Because the Board finds that Appellants are not County employees, the Board is granting the County's motion to dismiss it, as well as the named County officials, as parties to MSPB Case No. 11-09.¹⁵ Rather, the Board holds that Appellants' employer, Local Volunteer Fire Department, is the appropriate party.¹⁶

Appellants Have Failed To Show Irreparable Harm So As To Warrant The Granting Of A Stay.

Pursuant to MCPR, Section 35-6, the Board is empowered to grant a stay based upon such reasons as it may find proper and just. It is well established that the Board generally will not grant a stay request absent a showing of irreparable harm, see MSPB Case Nos. 08-12 (2008); MSPB Case No. 09-10 (2009); MSPB Case No. 09-11 (2009). Where monetary relief will make an employee whole, no irreparable harm will be found. See In re Frazier, 1 M.S.P.R. 280 (1979) (citing to Sampson v. Murray, 415 U.S. 61 (1974)); MSPB Case No. 09-10; MSPB Case No. 09-11. The Board has carefully reviewed all of the material submitted by the parties. The Board is of the opinion that any harm to Appellants by their terminations can adequately be addressed by the Board, should Appellants prevail on the merits of their appeal after a hearing on the matter.

ORDER

The Board hereby grants the County's Motion to Dismiss it as a party to this case. The Board also denies Appellants' request for a stay. The Board hereby notifies Local Volunteer Fire Department that Appellants have filed an appeal¹⁷ and orders LVFD, through

¹⁴ This is consistent with the position taken by LVFD in LVFD v. Montgomery County, Maryland, et al., Civ. No. 239936 (Cir. Ct. for Montgomery County, MD) that, as an independent corporation, it retains the right to hire and fire its employees. See County's Reply at 2; County Ex. 6 at 185.

¹⁵ Because the Board is dismissing the County as a party, the Board denies Appellants' Motion for Service of Discovery Requests on the County.

¹⁶ This determination is consistent with the Board's action in MSPB Case No. 10-08. In that case, the appellant, an Administrative Staff Person with an LFRD, had the appellant's position eliminated due to a funding cut by the County. The appellant alleged that OHR had failed to follow the RIF regulations when the appellant's position was eliminated. While the appellant argued the appellant's appeal was against the County and not the appellant's LFRD, the Board nevertheless ordered the LFRD to respond to the appeal, which it did.

¹⁷ Pursuant to Section 35-8(b) of the Montgomery County Personnel Regulations, 2001 (as amended), the Board will provide LVFD with a copy of Appellants' appeal.

counsel,¹⁸ to submit its Prehearing Submission by **COB February 28, 2011.**¹⁹ Appellants are ordered to submit their Prehearing Submission by **COB March 21, 2011.**²⁰ Upon receipt of the parties' Prehearing Submissions, the Board will schedule an expedited Prehearing Conference in this matter.

¹⁸ The Maryland Court of Special Appeals has ruled that practice before the Board constitutes the practice of law. See Lukas v. Bar Association of Montgomery County, Maryland, Inc., 35 Md. App. 442, 448, 371 A.2d 669, 673, cert. denied, 280 Md. 733 (1977).

¹⁹ The Board is providing LVFD and Appellants' counsel with a copy of the MSPB Hearing Procedures, along with this Decision. The Prehearing Submission requirements are detailed in Section VI of the MSPB Hearing Procedures.

²⁰ The Board notes that its hours of business are Monday-Thursday from 9:30 a.m. to 3:00 p.m. Thus, LVFD must file its Prehearing Submission by 3:00 p.m. on Monday, February 28, 2011, and Appellants must file their Prehearing Submission by 3:00 p.m. on Monday, March 21, 2011.

MOTION TO BIFURCATE

CASE NO. 11-02

DECISION ON COUNTY'S MOTION TO BIFURCATE

On September 13, 2010, the County filed its Prehearing Submission in the above-captioned case (County's Prehearing Submission). In the County's Prehearing Submission, the County moved to bifurcate the appeal and have the Merit System Protection Board (Board) conduct a preliminary evidentiary hearing on the "timeliness of discipline" issue. County's Prehearing Submission at 2. In support of this request, the County noted that Appellant had presented the defense that the charges against Appellant were "untimely" and therefore the discipline should be rescinded because of the lack of timeliness. *Id.* The County recognized that Appellant's timeliness defense was reasonable, given the period of time that elapsed between the occurrence of the conduct that is the subject of the disciplinary action and the initiation of the disciplinary action. *Id.*

Appellant, in Appellant's Prehearing Submission filed on October 4, 2010, agreed with the County that a reasonable approach to this Appeal would be for the Board to conduct a preliminary evidentiary hearing on the timeliness issue before proceeding to consider the merits of the instant disciplinary action. Appellant's Prehearing Submission at 1.

The Board's staff member subsequently notified the parties of the Prehearing Conference date and requested that both parties come to the Conference prepared to address which of their exhibits would be used and which witnesses would be called to testify if the Board granted the motion to bifurcate. In response, the County filed a Supplemental Prehearing Submission, indicating it would offer seven exhibits and call five witnesses at such a preliminary hearing. At the Prehearing Conference on October 18, 2010, Appellant indicated Appellant would call the same witnesses as the County at such a preliminary hearing and would offer only a few of Appellant's exhibits into evidence at a preliminary hearing.

APPLICABLE LAW AND REGULATIONS

Montgomery County Code, Chapter 2A, Administrative Procedures Act, Section 2A-8. Hearings, which states in applicable part,

- (d) **Burden of going forward with the evidence.** The charging party shall have the burden of going forward with the production of evidence at the hearing before the hearing authority; provided, however, where a governmental agency or an administrative authority is a party, such agency or administrative authority shall have the burden of going forward with the production of evidence at the hearing before the hearing authority. Such evidence shall be competent, material and relevant to all matters at issue and relief requested.

Montgomery County Personnel Regulations (MCPR), 2001 (as amended December 11, 2007, October 21, 2008, and November 3, 2009), Section 33, *Disciplinary Actions*, which states in applicable part:

33-2. Policy on disciplinary actions

(b) ***Prompt discipline.***

- (1) A department director should start the disciplinary process promptly and issue a statement of charges within 30 calendar days of the date on which the supervisor became aware of the employee's conduct, performance, or attendance problem.
- (2) A department director may wait for more than 30 calendar days to issue a statement of charges if an investigation of the employee's conduct or other circumstances justify a delay.

ANALYSIS AND CONCLUSIONS¹

Under the County's Administrative Procedures Act, the County has the burden of proving by a preponderance of the evidence that it adhered to the applicable regulations when imposing discipline. The personnel regulations provide that discipline should be prompt and that a department director should issue a Statement of Charges within 30 calendar days of the date on which the supervisor became aware of the employee's conduct problems. An exception to this requirement is where an investigation of the employee's conduct or other circumstances justifies a delay.

The Statement of Charges issued to Appellant references alleged incidents of sexual harassment by Appellant towards the Administrative Person between the dates of October 2008 and April 2009. It also references an alleged incident in September 2008 regarding purported racist comments made by Appellant to Mr. E. Finally, the Statement of Charges references an alleged incident that occurred in connection with the promotional interview panel that Mr. E served on which resulted in the Administrative Person's promotion. The Statement of Charges does not indicate exactly when this incident occurred.

The Statement of Charges indicates that the Administrative Person filed the complaint against Appellant on April 24, 2009. However, the investigation was not completed and provided to the Department until May 5, 2010, over a year later.

Given the significant amount of time which elapsed between the filing of the complaint and the issuance of the Statement of Charges, the Board has serious concerns about whether the discipline was prompt, in accordance with the personnel regulations.

¹ At the Prehearing Conference, the Board Chairperson read to the parties the following analysis and conclusions of the Board with regard to the County's Motion to Bifurcate.

Therefore, the Board finds it is appropriate to hold a preliminary hearing on the timeliness of the completion of the investigation. The Board expects the County, during this preliminary hearing, to produce evidence justifying the need for the County taking over a year to complete the investigation from the date of the complaint. Absent a satisfactory explanation, the Board will find that the County failed to justify its delay in issuing the Statement of Charges and will rule against the County based on its failure to adhere to the procedures set forth in the personnel regulations.

ORDER

Based on the foregoing, the County's Motion to Bifurcate is granted. A preliminary hearing on the issue of timeliness of the discipline at issue in this Appeal will be held on December 9, 2010.

MOTION TO ADD A WITNESS

CASE NO. 11-02

DECISION ON COUNTY'S MOTION TO ADD A WITNESS

On November 1, 2010, the County filed its Second Supplemental Prehearing Submission in the above-captioned case (Second Supplemental Submission). In the County's Second Supplemental Submission, the County asked permission to add an additional witness – Assistant County Attorney – to the list of witnesses it provided in its Prehearing Submission and its Supplemental Prehearing Submission. Appellant did not respond to the County's request to add a witness.

As noted in the County's Second Supplemental Prehearing Submission, the Board has agreed to the parties' request¹ to bifurcate the instant appeal and hold a preliminary hearing on the subject of the timeliness of the discipline imposed in this case. In its Decision on the County's Motion to Bifurcate,² the Board indicated it had serious concerns with why the County took over a year to complete the investigation into the complaint that led to the disciplinary action at issue in this case. The Board also indicated that it was incumbent on the County to justify its delay in issuing the Statement of Charges against Appellant.

In response to the Board's Decision on the County's Motion to Bifurcate, the County's Counsel states that Counsel has conducted discussions with several of the County's witnesses subsequent to the Prehearing Conference in this matter. Said witnesses have indicated that the draft investigation report was delivered to the Assistant County Attorney for legal review on December 29, 2009. Second Supplemental Submission at 5. According to the County, the Assistant County Attorney did not complete the legal review of the draft investigative report until almost three months later, on March 24, 2010. *Id.* The County now seeks to call the Assistant County Attorney as a witness so that the Assistant County Attorney can explain why the legal review of the draft investigative report was not completed until March 24, 2010. *Id.*

As the County has shown good cause for its request to call the Assistant County Attorney as a witness, the Board grants the County's request.

ORDER

Based on the foregoing, the County's request to call the Assistant County Attorney as

¹ The County filed a Motion to Bifurcate with the Board and Appellant, in Appellant's Prehearing Submission, agreed with the County's Motion to Bifurcate.

² The Board indicated its decision on the Motion to Bifurcate at the Prehearing Conference on this matter and then issued a written decision explaining its reasons for granting the motion.

a witness at the preliminary hearing on December 9, 2010 is granted.

MOTION IN LIMINE

CASE NO. 10-19

DECISION ON COUNTY'S MOTION IN LIMINE

On August 19, 2010, the County filed a Motion in Limine, seeking to have the Merit System Protection Board (Board) exclude various of Appellant's Exhibits¹ and five of Appellant's proposed witnesses,² arguing they are not relevant to the adjudication of this case. In addition, the County filed two Stipulations in the case. The first Stipulation dealt with awards and letters of commendation and appreciation received by Appellant (County Stipulation 1). The second Stipulation acknowledged that Appellant had a medical condition in 2009 and 2010 which led to most of Appellant's absences (County Stipulation 2). Appellant failed to respond to the County's Motion or its Stipulations.

BACKGROUND

This appeal involves a termination action based upon excessive absences caused by an ongoing medical problem that was not resolved within three (3) calendar months after the date Appellant exhausted all of Appellant's paid leave. County's Motion in Limine at 1-2. As Appellant was part of the Municipal and County Government Employees Organization, United Food and Commercial Workers, Local 1994 (MCGEO) bargaining unit, Appellant's termination action was processed under the terms of the collective bargaining agreement (CBA) between MCGEO and the County.³ *Id.* at 1.

Appellant's Prehearing Submission included various exhibits that related to Appellant's performance in calendar years 2006 and 2007. *See* A. Exs. 8-15. The County seeks to have the Board exclude these exhibits as they are not relevant to the appeal. The County notes that it has proffered a stipulation that Appellant received several commendations for Appellant's performance. It also argues that Appellant's good performance in 2006 and 2007 has nothing to do with Appellant's extended absences in 2009 and 2010, which is the basis for Appellant's termination.

Appellant's Exhibit 16, which the County also seeks to exclude, is a Payroll Advice

¹ Specifically, the County seeks to exclude Appellant's Exhibits (A. Exs.) 8-15, 16, and 17-19.

² The County seeks to exclude the following witnesses: Witness A, Witness B, Witness C, Witness D, and Witness E.

³ As Appellant's termination action was pursuant to Article 26 of the CBA, the Board required the County to provide it with a copy of the entire Article 26 in effect at the time of Appellant's termination before deciding this matter.

issued to Appellant.⁴ The County argues that as the document is undated, it is incompetent and irrelevant evidence.⁵ The document shows Appellant had an annual leave balance of 32.44 hours and a sick leave balance of 20.91 at the time Appellant received the Payroll Advice.

Finally, the County seeks to exclude A. Exs. 17-19, which are medical reports from Appellant's physicians. The County argues that it has stipulated that Appellant had a medical condition that was the basis for Appellant's absences in 2009 and 2010. Therefore, the County asserts that these medical reports are irrelevant.

As previously noted, the County also seeks to bar five of Appellant's proposed witnesses. In Appellant's Prehearing Submission, Appellant indicated that Witness A's testimony would cover Witness A's personal knowledge of Appellant's medical condition and treatment and the issues at work resulting from such treatment, as well as Witness A's experience with Appellant's work product. With regard to Witness A, the County asserts that Witness A's testimony is neither competent nor relevant. The County notes that since Witness A is not a health care provider, Witness A is not competent to testify about Appellant's medical condition. The County also notes that it has stipulated that Appellant had a medical condition that was the basis for Appellant's absences in 2009 and 2010. The County asserts that Witness A's proposed testimony about Appellant's work product is irrelevant, as the County has stipulated that Appellant received awards and commendations for Appellant's performance in 2006 and 2007 prior to Appellant's extended absences in 2009 and 2010.

Appellant's Prehearing Submission indicates that Witness B is being called to testify about Witness B's personal knowledge of Appellant's medical condition and treatment and the issues at work resulting from such treatment. The County seeks to exclude Witness B on the basis that Witness B is not competent to testify regarding Appellant's medical condition and treatment, as Witness B is not a health care provider.

The County seeks also to exclude Witness C. Appellant's Prehearing Submission indicates that Witness C is being called to testify about Witness C's personal knowledge of Appellant's medical condition and treatment and the issues at work resulting from such treatment. The County notes that Witness C is not a health care provider and, therefore, lacks the competence to testify about Appellant's medical condition.

⁴ The Board notes that Appellant's Ex. 16 also appears as part of Appellant's Ex. 19 (the last page).

⁵ Although it appears that part of the document is missing which might reflect a date of issuance, the Payroll Advice does reference an upcoming Taste of Wheaton event on May 16. The Board notes that the 15th Annual Taste of Wheaton event was held on May 16, 2010. See County's website at http://www.montgomerycountymd.gov/apps/News/press/PR_details.asp?PrID=6547. Accordingly, it appears that this document could have relevant evidence as it reflects that Appellant had annual and sick leave balances at the time it was issued.

Appellant's Prehearing Submission indicates that Witness D, a physician, will testify regarding Appellant's medical conditions, current condition, and prognosis. The County seeks to exclude Witness D's testimony, as the County has stipulated that Appellant has a medical condition that was the basis of Appellant's absences in 2009 and 2010.

Finally, the County seeks to exclude Witness E, a physician. Appellant indicated that Witness E would testify regarding Appellant's medical conditions, current condition, and prognosis. The County seeks to exclude Witness E's testimony, as the County has stipulated that Appellant has a medical condition that was the basis of Appellant's absences in 2009 and 2010.

APPLICABLE LAW AND CONTRACTUAL PROVISIONS

Montgomery County Code, Chapter 2A, Administrative Procedures Act, Section 2A-8. Hearings, which states in applicable part,

- (e) **Evidence.** The hearing authority may admit and give appropriate weight to evidence which possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs, including hearsay evidence which appears to be reliable in nature. It shall give effect to the rules of privilege recognized by law. It may exclude incompetent, unreliable, irrelevant or unduly repetitious evidence, or produce evidence at its own request. The hearing authority may take official notice of commonly cognizable facts, facts within its particular realm of administrative expertise and documents or matters of public record. Parties shall be notified of matter and material so noticed while the record in the case is open and shall be afforded an opportunity to contest the facts so noticed.

Agreement between Municipal & County Government Employees Organization, United Food and Commercial Workers, Local 1994, AFL-CIO and Montgomery County Government, Montgomery County, Maryland, For the Years July 1, 2007 through June 30, 2010, Article 26, Termination, which states in applicable part:

26.1 Definition

Termination is a nondisciplinary act by management to conclude an employee's service with the County. Reasons for termination include, but are not necessarily limited to the following:

- (b) excessive absences caused by ongoing medical or personal problems that are not resolved within 3 calendar months after the date the employee exhausts all paid leave, including any grants of leave received from the sick leave bank.

26.2 Management Responsibility

- (a) Prior to terminating an employee for the reasons stated in (b) above, management must inform the employee in writing of the problem, counsel the employee as to what corrective action to take; and allow the employee adequate time to improve or correct performance or attendance.

ANALYSIS AND CONCLUSIONS

The County argues that the issue before the Board is whether Appellant's termination was in compliance with Article 26.1 of the CBA and, therefore, the Board should only admit testimony and hear witnesses relevant to that issue. The Board disagrees. The issue in this case is whether Appellant's termination was in compliance with Article 26 of the CBA, not just Section 26.1.⁶

Under Section 2A-8(e) of the Administrative Procedures Act, the Board may exclude evidence if it is not relevant. The Board will admit evidence if it is relevant to the issues in the case and tends to establish or disprove them. Cook v. State, 118 Md. App. 404, 416, 702 A.2d 971, 976 (1997), cert. denied, 349 Md. 234, 707 A.2d 1328 (1998) (citing to Md. Rules 5-401 to 402); Dorsey v. State, 276 Md. 638, 643, 350 A.2d 665, 669 (1976)); Parker v. State, 156 Md. App. 252, 268, 846 A.2d 485, 498, cert. denied, 382 Md. 347, 855 A.2d 350 (2004) (same).

As previously noted, the instant appeal involves Appellant's termination based on excessive absences caused by an ongoing medical problem that was not resolved within 3 calendar months after the date the employee exhausted all paid leave. A termination action pursuant to Article 26 is a nondisciplinary act by management to conclude an employee's services with the County. CBA, § 26.1. Thus, in order to prevail, the County must establish that: 1) Appellant had an ongoing medical problem; 2) that Appellant exhausted all Appellant's paid leave; and 3) that after the exhaustion of all Appellant's paid leave, Appellant's medical problem was not resolved within 3 calendar months. In addition, the County must demonstrate it complied with the provisions of Section 26.2(a) of the CBA.

The County has proffered a stipulation that Appellant had a medical condition in 2009 and 2010 which was the cause of most of Appellant's absences. As Appellant has not opposed this Stipulation, the Board accepts it. Likewise, the Board accepts the second Stipulation concerning Appellant's awards and letters of commendation and appreciation for Appellant's performance in 2006 and 2007.

As it is established that Appellant had a medical condition in 2009 and 2010, County Stipulation 2, the Board finds that there is no need for testimony or exhibits regarding this matter. Accordingly, the Board grants the County's Motion in Limine with regard to Appellant's Exs. 17-19 and Witness D and Witness E. As it is also established that Appellant

⁶ The Board notes that Section 26-2(a) of the CBA provides certain due process rights to the Appellant. The Board assumes the County will address its compliance with this Section during the hearing in this matter.

received awards and letters of appreciation and commendation in 2006 and 2007, Stipulation 1, the Board finds that there is no need for testimony or exhibits on this matter. Accordingly, the Board grants the County's Motion in Limine with regard to Appellant's Exs. 8-15 and Witness A, Witness B, and Witness C.

With regard to A. Ex. 16, the undated Payroll Advice, it would appear that it contains evidence which goes to the issue of whether Appellant had exhausted all of Appellant's paid leave as required by Article 26. The Board will allow the exhibit and accord it the weight due it after hearing testimony on it.

ORDER

Based on the foregoing, the County's Motion in Limine is granted except for Appellant's Ex. 16. Thus, Appellant's Exhibits 8-15 and 17-19 are excluded, as well as Appellant's Witnesses A, B, C, D and E.

ENFORCEMENT OF BOARD DECISIONS **AND ORDERS**

If an appellant settles a case with the County while in proceedings before the Board, the parties may enter the settlement agreement into the record, which permits the Board to enforce the settlement agreement should a disagreement arise between the parties regarding the settlement agreement provisions.

The Board may also be asked to ensure enforcement of its Final Decisions by a party. The Board, where appropriate, will seek enforcement of its Decisions by certifying the matter to the County Attorney, who is required to initiate proceedings in the Circuit Court on the Board's behalf. See Montgomery County Code, Section 33-15(d). Prior to certifying a matter for enforcement, the Board may issue a Show Cause Order to the party that allegedly has failed to comply with its Decision to determine whether there is a basis for seeking enforcement.

During FY11, one settlement agreement was entered into the record, so as to permit the Board to have jurisdiction to enforce it.

ENTRY OF SETTLEMENT AGREEMENT INTO THE RECORD

CASE NO. 10-18

ACCEPTANCE OF SETTLEMENT AGREEMENT INTO THE RECORD

On September 16, 2010, the parties jointly filed a Settlement Agreement with the Merit System Protection Board (Board or MSPB) in the above-captioned case. The parties requested the Board approve the Settlement Agreement and retain jurisdiction to enforce the Settlement Agreement. The parties also requested that the Board retain a notice of Appellant's appeal but return all remaining documents to the parties, including the parties' Prehearing Submissions.

This appeal involved the two-week suspension of Appellant. As this case involves a suspension action, the Board finds that it has jurisdiction to accept the Settlement Agreement into the record. Pleshaw v. OPM, 98 M.S.P.R. 478, 480 (2005). The Board has reviewed the Settlement Agreement carefully. The Board notes that Appellant was represented by counsel, the Settlement Agreement is lawful on its face, and freely entered into by the parties. Id.; McGann v. Dep't of Housing and Urban Development, 56 M.S.P.R. 17, 18 (1992). Therefore, the Board agrees to accept the Settlement Agreement into the record.

ORDER

Based on the foregoing, the Board hereby orders the following:

1. the Board will retain a copy of Appellant's Notice of Appeal;
2. the Board will return all remaining documents in its possession to the parties, including Appellant's and the County's Prehearing Submissions;
3. the Board approves the Settlement Agreement and Release filed by the parties and will enter this matter into the MSPB's records as a settled case; and
4. the Board hereby dismisses this case as settled but will retain jurisdiction over this matter should a dispute arise concerning the interpretation of the Settlement Agreement.

STAYS

Pursuant to Section 35-6(b) of the Montgomery County Personnel Regulations, the Board is empowered on its own motion or pursuant to a request by an appellant to issue a stay if it finds the reasons for said stay are proper and just.

During FY11, the Board issued the following decisions concerning requests for stays of dismissals.

STAY DECISIONS

CASE NO. 11-10
CASE NO. 11-11
CASE NO. 11-13
CASE NO. 11-14
CASE NO. 11-15
CASE NO. 11-16
CASE NO. 11-17
CASE NO. 11-18
CASE NO. 11-19
CASE NO. 11-20
CASE NO. 11-21
CASE NO. 11-24
CASE NO. 11-26¹

DECISION ON APPELLANT'S STAY REQUEST

On January 6, 2011, Appellant filed an appeal with the Merit System Protection Board (Board), challenging the County's action in defunding and thus purportedly forcing the elimination of all administrative staff positions of the Local Fire and Rescue Departments (LFRDs), to include Appellant's position² with the Local Volunteer Fire Department (LVFD). In the appeal, Appellant requested that the Board stay the defunding of the LFRD administrative staff positions and the Fire Chief's reduction-in-force directives to the LFRDs pending an adjudication of Appellant's appeal on the merits.³

¹ The substance of the decisions in all of these cases was nearly identical. Therefore, only one decision is included in this Annual Report and is representative of all the cases listed.

² Appellant is an Administrative Staff person.

³ Appellant, in Appellant's appeal, incorporated by reference the issues raised and relief sought in MSPB Case No. 11-09. In a separate opinion issued this day, the Board denied the request for a stay in MSPB Case No. 11-09 and dismissed the County as a party to that appeal. The Board hereby incorporates by reference its analysis and conclusions in MSPB Case No. 11-09.

Pursuant to Montgomery County Personnel Regulations, 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, and July 27, 2010), Section 35-7(b), the Board is empowered to grant a stay upon such conditions as it may believe proper and just. The Board generally will not grant a stay request absent a showing of irreparable harm, see MSPB Case Nos. 05-07 (2005), 08-12 (2008), 09-10 (2009), 09-11 (2009). Where monetary relief will make an employee whole, no irreparable harm will be found. See In re Frazier, 1 M.S.P.R. 280 (1979) (citing to Sampson v. Murray, 415 U.S. 61 (1974)). The Board has carefully reviewed the material submitted by Appellant and the arguments set forth in MSPB Case No. 11-09, as incorporated by reference in Appellant's appeal. The Board is of the opinion that any harm to Appellant by allowing Appellant's termination action to become effective on February 11, 2011 can adequately be addressed by the Board should Appellant prevail on the merits of Appellant's appeal after a hearing on the matter.

ORDER

Accordingly, the Board denies Appellant's request for a stay. The Board hereby notifies Local Volunteer Fire Department that Appellant has filed an appeal⁴ and orders LVFD, through counsel,⁵ to submit its Prehearing Submission by **COB February 28, 2011**.⁶ Appellant is ordered to submit Appellant's Prehearing Submission by **COB March 21, 2011**.⁷ Upon receipt of the parties' Prehearing Submissions, the Board will schedule an expedited Prehearing Conference in this matter.

⁴ Pursuant to Section 35-8(b) of the Montgomery County Personnel Regulations, 2001 (as amended), the Board is providing LVFD with a copy of Appellant's appeal along with this Order.

⁵ The Maryland Court of Special Appeals has ruled that practice before the Board constitutes the practice of law. See Lukas v. Bar Association of Montgomery County, Maryland, Inc., 35 Md. App. 442, 448, 371 A.2d 669, 673, cert. denied, 280 Md. 733 (1977).

⁶ The Board is providing LVFD and Appellant with a copy of the MSPB Hearing Procedures along with this Decision. The Prehearing Submission requirements are detailed in Section VI of the MSPB Hearing Procedures.

⁷ The Board notes that its hours of business are Monday-Thursday from 9:30 a.m. to 3:00 p.m. Thus, LVFD must file its Prehearing Submission by 3:00 p.m. on Monday, February 28, 2011, and Appellant must file its Prehearing Submission by 3:00 p.m. on Monday, March 21, 2011.

CASE NO. 11-12

DECISION ON APPELLANT'S STAY REQUEST

On January 6, 2011, Appellant filed an appeal with the Merit System Protection Board (Board), challenging the County's action in defunding and thus purportedly forcing the elimination of all administrative staff positions of the Local Fire and Rescue Departments (LFRDs), to include Appellant's position¹ with the Local Volunteer Fire Department (LVFD). In the appeal, Appellant requested that the Board stay the defunding of the LFRD administrative staff positions and the Fire Chief's reduction-in-force directives to the LFRDs pending an adjudication of Appellant's appeal on the merits.²

The Board Originally Lacked Jurisdiction Over Appellant's Appeal At The Time Appellant Filed It; Since Then, An Appealable Action Has Occurred To Vest The Board With Jurisdiction.

After Appellant filed Appellant's appeal, the Board's staff requested Appellant provide a copy of Appellant's Notice of Termination so that the Board could begin processing Appellant's appeal. Appellant responded to this request on January 10, 2011, challenging the delay in processing the appeal, as Appellant had filed the appeal to prevent the termination notice from being served.³ See Memorandum from Appellant to Merit System Protection Board, subject: MSPB Case #11-12. Subsequent to this response, Appellant did provide the Board with a copy of Appellant's Termination Notice.

The Board would note that the Board's jurisdiction is not plenary but is rather limited to that which is granted it by statute or regulation. See, e.g., King v. Jerome, 42 F.3d 1371, 1374 (Fed. Cir. 1994) (U.S. Merit System Protection Board's jurisdiction is only over those actions which were specifically provided for by some law, rule or regulation); Monser v. Dep't of Army, 67 M.S.P.R. 477, 479 (1995). As a limited jurisdiction tribunal whose jurisdiction is derived from statute or regulation, the Board is obligated to ensure it has jurisdiction over the action before it. Schwartz v. USPS, 68 M.S.P.R. 142, 144-45 (1995). The Board only has jurisdiction over removal, demotion, and suspension actions, as well as

¹ Appellant is an Administrative Specialist with LVFD.

² Appellant, in the appeal, incorporated by reference the issues raised and relief sought in MSPB Case No. 11-09. In a separate opinion issued this day, the Board denied the request for a stay in MSPB Case No. 11-09 and dismissed the County as a party to that appeal. The Board hereby incorporates by reference its analysis and conclusions in MSPB Case No. 11-09.

³ Appellant at this point had been served by LVFD with a Notice of Intent – Reduction-in-Force but not the actual termination notice. The Notice of Intent informed Appellant that Appellant would receive the termination notice on January 11, 2011.

other disciplinary actions. See Montgomery County Code, Section 33-12(a). The Board also has jurisdiction over grievances after an adverse decision by the Chief Administrative Officer and involuntary resignations. Montgomery County Code, Section 33-12(b). Thus, until such time as Appellant was able to provide an actual Termination Notice – Reduction-In-Force, the Board lacked jurisdiction to hear the appeal, as all Appellant had was a Notice of Intent to terminate Appellant. As Appellant has subsequently produced the required Termination Notice, the Board is now vested with jurisdiction to adjudicate Appellant’s appeal.

Pursuant to Section 21-16 of the County Code, Appellant Is Not A County Employee.

Appellant filed additional comments after filing Appellant’s appeal, challenging the County’s response to MSPB Case Nos. 11-09 and 11-23,⁴ and providing arguments against the County’s position. Specifically, the County, in response to MSPB Case Nos. 11-09 and 11-23, sought to be dismissed as a party, arguing that the LFRD employees, though covered by generally applicable Montgomery County Personnel Regulations, are subject to a separate merit system and are not County employees. See County’s Motion to Dismiss at 1; County’s Reply to Appellants’ Opposition to Motion to Dismiss and Appellants’ Supplemental Filing. In support of this assertion, the County pointed to Section 21-16 of the County Code. Id. The County asserted that the appellants in MSPB Case No. 11-09 are employees of their LFRD and, therefore, their LFRD is the proper party to their appeal.

In response to this argument, Appellant argued that the County, although claiming that LFRD employees are not County employees but part of a separate merit system, nevertheless furloughed the LFRD employees, just as the County furloughed all County merit employees. According to Appellant, if the LFRD employees are considered County employees for the purpose of applying a County-wide furlough, then the LFRD employees should be considered County employees for the purpose of applying the reduction-in-force (RIF) policies in the Montgomery County Personnel Regulations. See Email from Appellant to Board staff, dated 01/14/11, subject: FW: County response to appeal (hereinafter Appellant’s Reply). Specifically, Appellant asserted that the County should apply the RIF regulations to all Montgomery County Fire and Rescue Service administrative employees, not just the LFRD administrative employees, and determine terminations by seniority. Id.

In response to Appellant’s Reply, the County filed a response (County’s Response), indicating it had inadvertently furloughed the LFRD administrative staff. County’s Response at 1. This mistake was due to the fact that the County converted to an automated online payroll system, Mctime. Id. The County noted that Appellant could have grieved the error

⁴ Subsequent to the filing of MSPB Case No. 11-23, the appellants in that case sought to consolidate it with their original appeal, MSPB Case No. 11-09. The Board granted the motion. Accordingly, all references to MSPB Case No. 11-09 include all issues and pleadings raised in MSPB Case No. 11-23.

regarding the furlough, but failed to do so.⁵ Id.

Appellant filed further replies to the County Response (Appellant's Sur-Reply and Appellant's Supplemental Sur-Reply), asserting that the County did not mistakenly apply the furlough to the LFRD employees but did so deliberately. See Email from Appellant to Board staff, dated 01/31/11, subject: Re: Termination Notice – Appellant (Appellant's Sur-Reply); Email from Appellant to Board staff, dated 01/31/11, subject: Re: Termination Notice – Appellant with attached email from OHR staff person, dated 01/25/11, subject: RE: Furlough Questions (Appellant's Supplemental Sur-Reply). Appellant noted that the County's Office of Human Resources has also indicated that it intends to deduct any furlough hours not taken by an LFRD employee from their final paycheck.⁶ Id.

In order to resolve this matter, it is necessary to look to the applicable statutory provisions enacted by the County Council which govern LFRD employees. It is well established that the cardinal rule of statutory construction is to “ascertain and effectuate the intent of the Legislature” which, in this case, is the County Council. Mayor and Town Council of Oakland v. Mayor and Town Council of Mountain Lake Park, 392 Md. 301, 316, 896 A.2d 1036, 1045 (2006); Chow v. State, 393 Md. 431, 443, 903 A.2d 388, 395 (2006); Moore v. State, 388 Md. 446, 452, 879 A.2d 1111, 1114 (2005). In ascertaining legislative intent, the Board will examine the plain language of the statute and, if the plain language is unambiguous and consistent with the statute's apparent purpose, the Board will give effect to the statute as written. Mayor and Town of Oakland, 392 Md. at 316, 896 A.2d at 1045; Piper Rudnick v. Hartz, 386 Md. 201, 218, 872 A.2d 58, 68 (2005). In performing this review, the rule is that the “Legislature is presumed to have meant what it said and said what it meant.” Witte v. Azarian, 369 Md. 518, 525, 801 A.2d 160, 165 (2002); Walzer v. Osborne, 395 Md. 563, 572, 911 A.2d 427, 432 (2006). If the words of a statute are clear and unambiguous, then the Board need not look beyond the statute in order to determine the Council's intent. Marriott Employees Federal Credit Union v. MVA, 346 Md. 437, 445, 697 A.2d 455, 458 (1997); Walzer, 395 Md. at 572, 911 A.2d at 432. Rather, if the words of the statute are clear, unambiguous and express a plain meaning, the Board will give effect to the statute as written. Jones v. State, 336 Md. 255, 261, 647 A.2d 1204, 1206-07 (1994); Walzer, 395 Md. at 572, 911 A.2d at 432. As the Court of Appeals for Maryland has counseled, the Board should “neither add nor delete words to a clear and unambiguous statute to give it a meaning not reflected by the words the Legislature used or engage in forced or subtle interpretation in an attempt to extend or limit the statute's meaning.” Taylor v. Nations-Bank, N.A., 365 Md. 166, 181, 776 A.2d 645, 654 (2001); Walzer, 395 Md. at 572, 911 A.2d at 432; see Chow, 393 Md. at 444, 903 A.2d at 395.

⁵ Although Appellant failed to timely grieve being furloughed, the Board certainly expects that the County take appropriate steps to make Appellant and the other LFRD employees whole for its acknowledged error.

⁶ Given the County has admitted the furlough is a mistake, County's Response at 1, the County should not deduct from their last paycheck any furlough hours not taken by an LFRD employee who is terminated.

The applicable statutory provisions governing LFRD employees are found at Section 21-16 of the County Code and provide:

- (a) Applicability of County Regulations. **Employees of local fire and rescue departments who are paid with tax funds are not County employees.** They are members of a separate merit system governed by generally applicable County personnel regulations except as expressly modified by regulations that the County Executive, after receiving Commission approval under Section 21-2(d)(4), adopts under method (2).
- (b) Personnel services. The Office of Human Resources must provide the following services to the local fire and rescue departments:
 - (1) Uniform administration and application of personnel regulations and policies.
 - (2) Consistent administration and application of a uniform pay plan and benefit program, which must be substantially equivalent to that of the County government.
 - (3) Disbursement of salaries and wages, including withholding for taxes and fringe benefits through the County's payroll system.
 - (4) Review for consistency with applicable personnel regulations all personnel transactions involving employees of local fire and rescue departments paid with tax funds.
 - (5) Use of the Merit System Protection Board.
- (c) Limitations. **Nothing in this Chapter means that employees of the local fire and rescue departments are County employees, either on a de jure or de facto basis.** Nothing in this Chapter abrogates the authority of each local fire and rescue department over such functions as hiring, promotion, discipline, and discharge of employees of that department; the assignment of administrative staff; and day-to-day assignments of volunteer personnel at that department. This Section does not diminish the authority of County government to act under Sections 21-13 and 21-14 or the authority of the Fire Chief to discipline an employee or volunteer of a local fire and rescue department as provided in Section 21-3(g).

(Emphasis added).

The Board finds that the statutory provisions are quite clear and unambiguous. LFRD employees “are not County employees” but, rather, members of a separate merit system.

They are governed by “generally applicable County personnel regulations”. While it is true that the County’s Office of Human Resources must provide certain personnel services to the LFRDs, “[n]othing in this [statute] means that employees of the local fire and rescue departments are County employees, either on a de jure or de facto basis.” It is absolutely clear from the statute that the Council, even though extending certain “County” benefits to LFRD employees,⁷ fully intended not to make LFRD employees County employees. See also MSPB Case Nos. 10-02, 10-08, 10-20.⁸ Because of this holding, the Board dismissed the County as a party to MSPB Case No. 11-09 and finds that it is not a party to the instant proceedings. Rather, Appellant’s employer, the Local Volunteer Fire Department, is the appropriate party.

Appellant Has Failed To Show Irreparable Harm So As To Warrant The Granting Of A Stay.

Pursuant to Montgomery County Personnel Regulations, 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, and July 27, 2010), Section 35-7(b), the Board is empowered to grant a stay upon such conditions as it may believe proper and just. The Board generally will not grant a stay request absent a showing of irreparable harm, see MSPB Case Nos. 05-07 (2005), 08-12 (2008), 09-10 (2009), 09-11 (2009). Where monetary relief will make an employee whole, no irreparable harm will be found. See In re Frazier, 1 M.S.P.R. 280 (1979) (citing to Sampson v. Murray, 415 U.S. 61 (1974)). The Board has carefully reviewed the material submitted by Appellant and the arguments set forth in MSPB Case No. 11-09, as incorporated by reference in Appellant’s appeal. The Board is of the opinion that any harm to Appellant by allowing Appellant’s termination action to become effective on February 11, 2011 can adequately be addressed by the Board, should Appellant prevail on the merits of Appellant’s appeal after a hearing on the matter.

ORDER

Accordingly, the Board denies Appellant’s request for a stay. The Board hereby notifies the Local Volunteer Fire Department that Appellant has filed an appeal⁹ and orders

⁷ While it is extremely regrettable that OHR, through the Mctime automated payroll system, imposed furloughs on the LFRD employees, OHR’s administrative error does not alter the Council’s express intent that the LFRD employees are not County employees.

⁸ While the County correctly noted that the Board has ruled in previous cases that LFRD administrative staff employees are not County employees, it incorrectly cited to MSPB Case No. 10-12 instead of MSPB Case No. 10-20 or 10-08. See County’s Reply to Appellants’ Opposition to Motion to Dismiss and Appellants’ Supplemental Filing.

⁹ Pursuant to Section 35-8(b) of the Montgomery County Personnel Regulations, 2001 (as amended), the Board is providing LVFD with a copy of Appellant’s appeal along with this Order.

LVFD, through counsel,¹⁰ to submit its Prehearing Submission by **COB February 28, 2011.**¹¹ Appellant is ordered to submit Appellant's Prehearing Submission by **COB March 21, 2011.**¹² Upon receipt of the parties' Prehearing Submissions, the Board will schedule an expedited Prehearing Conference in this matter.

¹⁰ The Maryland Court of Special Appeals has ruled that practice before the Board constitutes the practice of law. See Lukas v. Bar Association of Montgomery County, Maryland, Inc., 35 Md. App. 442, 448, 371 A.2d 669, 673, cert. denied, 280 Md. 733 (1977).

¹¹ The Board is providing LVFD and Appellant with a copy of the MSPB Hearing Procedures along with this Decision. The Prehearing Submission requirements are detailed in Section VI of the MSPB Hearing Procedures.

¹² The Board notes that its hours of business are Monday-Thursday from 9:30 a.m. to 3:00 p.m. Thus, LVFD must file its Prehearing Submission by 3:00 p.m. on Monday, February 28, 2011, and Appellant must file its Prehearing Submission by 3:00 p.m. on Monday, March 21, 2011.

CASE NO. 11-22

DECISION ON APPELLANT'S STAY REQUEST

On January 10, 2011, Appellant filed an appeal with the Merit System Protection Board (Board), challenging the County's action in defunding and thus purportedly forcing the elimination of all administrative staff positions of the Local Fire and Rescue Departments (LFRDs), to include Appellant's position¹ with the Local Volunteer Fire Department (LVFD). In Appellant's appeal, Appellant requested that the Board stay the defunding of the LFRD administrative staff positions and Montgomery County Fire and Rescue Service (MCFRS) Fire Chief's reduction-in-force directives to the LFRDs, pending an adjudication of Appellant's appeal on the merits.²

Pursuant to Section 21-16 of the County Code, Appellant Is Not A County Employee.

Appellant filed additional comments after filing Appellant's appeal (Appellant's Comments),³ challenging the County's inconsistent approach to following its rules in matters related to the LFRDs. Appellant noted that the Board previously ruled that the County's Personnel Regulations apply to LFRD employees.⁴ According to Appellant, under the County's Personnel Regulations, any reduction-in-force (RIF) action against an LFRD employee is the responsibility of the MCFRS County Fire Chief, who is the Department Director for purposes of the County Personnel Regulations. Appellant's Comments at 1. Therefore, Appellant claims that the RIF notice Appellant received from LVFD's President is invalid.

In addition, Appellant noted that, as of January 14, 2011, several LFRD employees received an additional twenty-six hours of compensatory leave on their leave reports in MCTime.⁵ Appellant's Comments at 2. Appellant states that when Appellant requested

¹ Appellant is an Administrative Specialist with LVFD.

² Appellant, in Appellant's appeal, incorporated by reference the issues raised and relief sought in MSPB Case Nos. 11-09 and 11-23. In a separate opinion issued this day, the Board denied the request for a stay in MSPB Case No. 11-09 (Case No. 11-23 was consolidated with Case No. 11-09) and dismissed the County as a party to that appeal. The Board hereby incorporates by reference its analysis and conclusions in MSPB Case No. 11-09.

³ A copy of Appellant's Comments was provided to the Office of the County Attorney. The County filed a response to Appellant's Comments (County's Response).

⁴ The Board so ruled in MSPB Case No. 10-02 (2009).

⁵ The Board notes that MCTime is a County-wide web-based application for recording time and attendance. See MCTime Information and Support available at <http://www.montgomerycountymd.gov/tfimpl.asp?url=/content/mctime/index.asp>.

information about the additional leave, Appellant was provided with a memo from the County's Office of Human Resources (OHR) Director, addressed to Executive Branch Department and Office Directors. Id. According to Appellant, none of the Presidents of the LFRDs received this memorandum. Id.

Appellant also noted that, under MTime procedures established by the County, the Presidents of the LFRDs are not permitted to electronically sign their LFRD employees' timecards. Appellant's Comments at 2. Instead, the LFRD Presidents must review the information submitted and email their approval to the MCFRS Division Chief, who is the only one allowed to electronically sign the timecard. Id.

The County responded to Appellant's Comments, noting that Appellant had failed to address the fact that, pursuant to statute, Appellant is not a County employee. County's Response at 1. The County noted that the Board has previously held in two cases filed by Appellant that LFRD employees are not County employees.⁶ Id. Therefore, according to the County, it should be dismissed as a party in this matter. Id. at 2.

The County indicated that, while it is true that twenty-six hours of compensatory time were given to LFRD employees as well as to County employees, this was a mistake. County's Response at 1-2. According to the County, MTime has corrected the error. Id. at 2. The County noted that MTime is a computer program licensed to the County with a limited number of "access users". Id. To prevent incurring additional expense by purchasing additional "access users" for each LFRD, the County arranged to have MCFRS Division Chief approve the LFRD administrative staff's time sheets for simplicity of process and cost savings. Id.

In order to resolve this matter, it is necessary to look to the applicable statutory provisions enacted by the County Council which govern LFRD employees. It is well established that the cardinal rule of statutory construction is to "ascertain and effectuate the intent of the Legislature" which, in this case, is the County Council. Mayor and Town Council of Oakland v. Mayor and Town Council of Mountain Lake Park, 392 Md. 301, 316, 896 A.2d 1036, 1045 (2006); Chow v. State, 393 Md. 431, 443, 903 A.2d 388, 395 (2006); Moore v. State, 388 Md. 446, 452, 879 A.2d 1111, 1114 (2005). In ascertaining legislative intent, the Board will examine the plain language of the statute and, if the plain language is unambiguous and consistent with the statute's apparent purpose, the Board will give effect to the statute as written. Mayor and Town of Oakland, 392 Md. at 316, 896 A.2d at 1045; Piper Rudnick v. Hartz, 386 Md. 201, 218, 872 A.2d 58, 68 (2005). In performing this review, the rule is that the "Legislature is presumed to have meant what it said and said what it meant." Witte v. Azarian, 369 Md. 518, 525, 801 A.2d 160, 165 (2002); Walzer v. Osborne, 395 Md. 563, 572, 911 A.2d 427, 432 (2006). If the words of a statute are clear and unambiguous, then the Board need not look beyond the statute in order to determine the Council's intent.

⁶ While the County correctly noted that the Board has ruled in Appellant's two previous cases that LFRD administrative staff employees are not County employees, it incorrectly cited to MSPB Case No. 10-12 instead of MSPB Case No. 10-20. See County's Response at 1.

Marriott Employees Federal Credit Union v. MVA, 346 Md. 437, 445, 697 A.2d 455, 458 (1997); Walzer, 395 Md. at 572, 911 A.2d at 432. Rather, if the words of the statute are clear, unambiguous and express a plain meaning, the Board will give effect to the statute as written. Jones v. State, 336 Md. 255, 261, 647 A.2d 1204, 1206-07 (1994); Walzer, 395 Md. at 572, 911 A.2d at 432. As the Court of Appeals for Maryland has counseled, the Board should “neither add nor delete words to a clear and unambiguous statute to give it a meaning not reflected by the words the Legislature used or engage in forced or subtle interpretation in an attempt to extend or limit the statute’s meaning.” Taylor v. Nations-Bank, N.A., 365 Md. 166, 181, 776 A.2d 645, 654 (2001); Walzer, 395 Md. at 572, 911 A.2d at 432; see Chow, 393 Md. at 444, 903 A.2d at 395.

The applicable statutory provisions governing LFRD employees are found at Section 21-16 of the County Code and provide:

- (a) Applicability of County Regulations. **Employees of local fire and rescue departments who are paid with tax funds are not County employees.** They are members of a separate merit system governed by generally applicable County personnel regulations except as expressly modified by regulations that the County Executive, after receiving Commission approval under Section 21-2(d)(4), adopts under method (2).
- (b) Personnel services. The Office of Human Resources must provide the following services to the local fire and rescue departments:
 - (1) Uniform administration and application of personnel regulations and policies.
 - (2) Consistent administration and application of a uniform pay plan and benefit program, which must be substantially equivalent to that of the County government.
 - (3) Disbursement of salaries and wages, including withholding for taxes and fringe benefits through the County's payroll system.
 - (4) Review for consistency with applicable personnel regulations all personnel transactions involving employees of local fire and rescue departments paid with tax funds.
 - (5) Use of the Merit System Protection Board.
- (c) Limitations. **Nothing in this Chapter means that employees of the local fire and rescue departments are County employees, either on a de jure or de facto basis. Nothing in this Chapter abrogates the authority of each local fire and rescue department over such functions as hiring, promotion, discipline, and discharge of employees of that department;** the

assignment of administrative staff; and day-to-day assignments of volunteer personnel at that department. This Section does not diminish the authority of County government to act under Sections 21-13 and 21-14 or the authority of the Fire Chief to discipline an employee or volunteer of a local fire and rescue department as provided in Section 21-3(g).

(Emphasis added).

The Board finds that the statutory provisions are quite clear and unambiguous. LFRD employees “are not County employees” but, rather, members of a separate merit system. See also MSPB Case Nos. 10-02, 10-08, 10-20. They are governed by “generally applicable County personnel regulations”.⁷ While it is true that the County’s Office of Human Resources must provide certain personnel services to the LFRDs,⁸ “[n]othing in this [statute] means that employees of the local fire and rescue departments are County employees, either on a de jure or de facto basis.” It is absolutely clear from the statute that the Council, even though extending certain “County” benefits to LFRD employees, fully intended not to make LFRD employees County employees. See also MSPB Case Nos. 10-02, 10-08, 10-20. With regard to Appellant’s argument that Mctime only permits a County employee, the Division Chief, to sign Appellant’s timecard, as Mctime is a County Office of Human Resources’ system, it is reasonable that the County uses a County employee to approve the timecard instead of an independent corporation’s President. As the Council made absolutely clear in the County Code, the extension of OHR policies to LFRD employees does not make them either de jure or de facto County employees. Montgomery County Code, Section 21-16(c).

Because of this holding, the Board dismissed the County as a party to MSPB Case No. 11-09 and finds that it is not a party to the instant proceedings. Rather, Appellant’s employer, Local Volunteer Fire Department, is the appropriate party.⁹

⁷ Appellant has asserted that the LVFD President does not occupy the position of a Department Director and therefore does not have the power to implement the RIF procedures for LVFD. See Appellant’s Comments at 1. What Appellant ignores is that the statute provides that the MCPR is “generally” applicable. The Board finds that the LVFD President, as head of the LVFD, occupies a position that is equivalent to a Department Director in the MCPR. Therefore, the LVFD President has full authority to implement a RIF action against Appellant, so long as it is in accord with the procedures set forth in the MCPR.

⁸ While it is regrettable that OHR, through the Mctime automated payroll system, mistakenly granted twenty-six hours of compensatory time to LFRD employees, OHR’s administrative error does not alter the Council’s express intent that the LFRD employees are not County employees.

⁹ This determination is consistent with the Board’s action in MSPB Case No. 10-08. In that case, the appellant, an Administrative Staff Person with an LFRD, had appellant’s position eliminated due to a funding cut by the County. The appellant alleged that OHR had failed to follow the RIF regulations when appellant’s position was eliminated. While the appellant argued appellant’s appeal was against the County and not appellant’s LFRD, the Board nevertheless ordered the LFRD to respond to the appeal, which it did.

Appellant Has Failed To Show Irreparable Harm So As To Warrant The Granting Of A Stay.

Pursuant to Montgomery County Personnel Regulations, 2001 (as amended February 15, 2005, October 21, 2008, November 3, 2009, and July 27, 2010), Section 35-7(b), the Board is empowered to grant a stay upon such conditions as it may believe proper and just. The Board generally will not grant a stay request absent a showing of irreparable harm, see MSPB Case Nos. 05-07 (2005), 08-12 (2008), 09-10 (2009), 09-11 (2009). Where monetary relief will make an employee whole, no irreparable harm will be found. See In re Frazier, 1 M.S.P.R. 280 (1979) (citing to Sampson v. Murray, 415 U.S. 61 (1974)). The Board has carefully reviewed the material submitted by Appellant and the arguments set forth in MSPB Case No. 11-09, as incorporated by reference in Appellant's appeal. The Board is of the opinion that any harm to Appellant by allowing Appellant's termination action to become effective on February 11, 2011 can adequately be addressed by the Board, should Appellant prevail on the merits of Appellant's appeal after a hearing on the matter.

ORDER

Accordingly, the Board denies Appellant's request for a stay. The Board hereby notifies the Local Volunteer Fire Department that Appellant has filed an appeal¹⁰ and orders LVFD, through counsel,¹¹ to submit its Prehearing Submission by **COB February 28, 2011.**¹² Appellant is ordered to submit Appellant's Prehearing Submission by **COB March 21, 2011.**¹³ Upon receipt of the parties' Prehearing Submissions, the Board will schedule an expedited Prehearing Conference in this matter.

¹⁰ Pursuant to Section 35-8(b) of the Montgomery County Personnel Regulations, 2001 (as amended), the Board is providing LVFD with a copy of Appellant's appeal along with this Order.

¹¹ The Maryland Court of Special Appeals has ruled that practice before the Board constitutes the practice of law. See Lukas v. Bar Association of Montgomery County, Maryland, Inc., 35 Md. App. 442, 448, 371 A.2d 669, 673, cert. denied, 280 Md. 733 (1977).

¹² The Board is providing LVFD and Appellant with a copy of the MSPB Hearing Procedures along with this Decision. The Prehearing Submission requirements are detailed in Section VI of the MSPB Hearing Procedures.

¹³ The Board notes that its hours of business are Monday-Thursday from 9:30 a.m. to 3:00 p.m. Thus, LVFD must file its Prehearing Submission by 3:00 p.m. on Monday, February 28, 2011, and Appellant must file its Prehearing Submission by 3:00 p.m. on Monday, March 21, 2011.

SHOW CAUSE ORDERS

The Board employs show cause orders to require one or both parties to justify, explain, or prove something to the Board. The Board generally uses show cause orders to determine whether it has jurisdiction over a case.

For example, the County's grievance process contains a sanction if management fails to meet the time limits therein. Pursuant to Section 34-9(a)(3) of the grievance procedure (as amended February 15, 2005, and October 21, 2008), "[i]f the supervisor, department director, or CAO, as appropriate, does not respond within the time limits specified, the employee may file the grievance at the next higher level." However, Section 34-9(a)(4) provides that "[i]f an employee files an appeal with the MSPB under (3) before the CAO issues a written response to the grievance, the MSPB may choose not to process the appeal, return the appeal to the employee, and ask the CAO to respond to the grievance within a specific period of time." Therefore, if the Board receives an appeal of a grievance where there is no CAO decision, in order to determine whether it should assert jurisdiction over the appeal or return it to the employee, the Board usually issues a Show Cause Order to the CAO. The Board will order the CAO to provide a statement of such good cause as existed for failing to follow the time limits in the grievance procedure and for why the MSPB should remand the grievance to the CAO for a decision. After receipt of the CAO's response, as well as any opposition filed by the employee, the Board issues a decision.

Alternatively, a Show Cause Order may be issued if there is a question as to the timeliness of an appeal. Section 35-3 of the personnel regulations provides employees with ten (10) working days within which to file an appeal with the Board after receiving a notice of disciplinary action over an involuntary demotion, suspension, or dismissal; receiving a notice of termination; receiving a written final decision on a grievance; or after the employee resigns involuntarily. If the employee files an appeal and it appears to the Board that the employee did not file an appeal within the time limits specified, the Board may issue a Show Cause Order to determine whether the appeal is in fact timely.

Finally, the Board may issue a Show Cause Order to determine whether it should sanction a party for failing to abide by the Board's appeal procedures or failing to comply with a Board order. Section 35-7 of the personnel regulations empowers the Board to dismiss a case as a sanction for a party's failure to comply with a Board rule or order.

During FY11, the Board issued the following Show Cause Order Decisions.

SHOW CAUSE ORDER DECISIONS

CASE NO. 11-15

CASE NO. 11-19

CASE NO. 11-22

CASE NO. 11-24

CASE NO. 11-26¹

SHOW CAUSE ORDER DECISION

On January 6, 2011, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board) challenging Appellant's termination due to reduction-in-force and requested the Board issue a stay of Appellant's termination. On February 3, 2011, the Board denied Appellant's request for a stay of Appellant's termination and ordered Appellant's employer, Local Volunteer Fire Department (LVFD), to submit its Prehearing Submission in this appeal by February 28, 2011.² See Decision and Order on Appellant's Stay Request.

When LVFD failed to submit its Prehearing Submission, the Board ordered LVFD to provide a statement of such good cause as exists for why LVFD failed to file its Prehearing Submission in this case. On March 14, 2011, LVFD, through counsel, responded to the Show Cause Order. LVFD indicated it did not have any intention of disregarding the Board's order to submit a Prehearing Submission; it simply did not understand the ramifications that resulted from the Board's decision to substitute LVFD as the Appellee in lieu of Montgomery County.³ LVFD apologized to the Board for the oversight and confusion in responding to the Board's order and indicated that it intends to participate in the process before the Board.

Appellant was provided an opportunity to respond to LVFD's good cause submission but failed to do so. Therefore, having considered LVFD's good cause submission, the Board

¹ The substance of the decisions in all of these cases was nearly identical. Therefore, only one decision is included in this Annual Report and is representative of all the cases listed.

² Pursuant to Section 35-8(g) of the Montgomery County Personnel Regulations, when a Local Fire and Rescue Department employee appeals a termination action, the Local Fire and Rescue Department must respond to the MSPB within 15 working days of notification of the appeal.

³ Appellant's appeal was originally filed against Montgomery County. The Board, in denying Appellant's Stay Request, indicated it had dismissed the County as a party to the appeal and notified Appellant's employer, LVFD, to respond.

finds Appellee LVFD has shown good cause for its failure to submit a Prehearing Submission as previously ordered by the Board. Accordingly, the Board hereby orders Appellee to file its Prehearing Submission by **COB Tuesday, April 12, 2011**. Appellant is ordered to file Appellant's Prehearing Submission by **COB Tuesday, May 3, 2011**. Upon receipt of the parties' Prehearing Submissions, the Board will schedule a Prehearing Conference in this matter.

CASE NO. 11-20

SHOW CAUSE ORDER DECISION

On January 10, 2011, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board) challenging Appellant's termination due to reduction-in-force and requested the Board issue a stay of Appellant's termination. On February 3, 2011, the Board denied Appellant's request for a stay of Appellant's termination and ordered Appellant's employer, Local Volunteer Fire Department (LVFD), to submit its Prehearing Submission in this appeal by February 28, 2011.¹ See Decision and Order on Appellant's Stay Request.

When LVFD failed to submit its Prehearing Submission, the Board ordered LVFD to provide a statement of such good cause as exists for why LVFD failed to file its Prehearing Submission in this case. On March 14, 2011, LVFD, through counsel, responded to the Show Cause Order. LVFD indicated it did not have any intention of disregarding the Board's order to submit a Prehearing Submission; it simply did not understand the ramifications that resulted from the Board's decision to substitute LVFD as the Appellee in lieu of Montgomery County.² LVFD apologized to the Board for the oversight and confusion in responding to the Board's order and indicated that it intends to participate in the process before the Board.

Appellant was provided an opportunity to respond to LVFD's good cause submission. Appellant filed a pleading with the Board on March 21, 2011, arguing that the Board was

¹ Pursuant to Section 35-8(g) of the Montgomery County Personnel Regulations, when a Local Fire and Rescue Department employee appeals a termination action, the Local Fire and Rescue Department must respond to the MSPB within 15 working days of notification of the appeal.

² Appellant's appeal was originally filed against Montgomery County. The Board, in denying Appellant's Stay Request, indicated it had dismissed the County as a party to the appeal and notified Appellant's employer, LVFD, to respond.

wrong to dismiss the County as a party.³ Appellant did not address the merits of LVFD's good cause submission.

Having considered LVFD's good cause submission, the Board finds Appellee LVFD has shown good cause for its failure to submit a Prehearing Submission as previously ordered by the Board. Accordingly, the Board hereby orders Appellee to file its Prehearing Submission by **COB Tuesday, April 12, 2011**. Appellant is ordered to file Appellant's Prehearing Submission by **COB Tuesday, May 3, 2011**. Upon receipt of the parties' Prehearing Submissions, the Board will schedule a Prehearing Conference in this matter.

³ As Appellant's pleading did not address the merits of Appellee LVFD's response to the Show Cause Order but rather the merits of the Board's Decision and Order on Appellant's Stay Request, the Board is treating Appellant's pleading as a Request for Reconsideration. Pursuant to the Board's Hearing Procedures, a copy of which was provided to Appellant with the Board's Decision and Order on Appellant's Stay Request, Appellant had five days from the receipt of the Board's ruling to file for reconsideration,. As the Board issued its decision on February 3, 2011, the Board finds Appellant's request is untimely and is therefore denied.

CASE NO. 11-22

SHOW CAUSE ORDER DECISION

On January 10, 2011, Appellant filed an appeal with the Merit System Protection Board (MSPB or Board) challenging Appellant's termination due to reduction-in-force and requested the Board issue a stay of Appellant's termination. On February 3, 2011, the Board denied Appellant's request for a stay of Appellant's termination and ordered Appellant's employer, Local Volunteer Fire Department (LVFD), to submit its Prehearing Submission. See Decision and Order on Appellant's Stay Request. On April 12, 2011, LVFD, through counsel, submitted its Prehearing Submission.

In accordance with the Board's Hearing Procedures, copies of which have been provided to Appellant on several occasions,¹ Appellant was required to submit Appellant's Prehearing Submission by COB May 3, 2011. Instead of submitting a Prehearing Submission, Appellant emailed the Board, indicating Appellant had nothing further to add beyond what Appellant had already communicated in this case. See Email from Appellant to Board staff, dated 05/03/11, subject: Re: MSPB Appeal No. 11-22 Response to LVFD and County.² The Board's staff member informed Appellant that Appellant's email did not comply with the Board's Hearing Procedures.³ See Email from Board staff member to Appellant, dated 05/03/11, subject: Re: MSPB Appeal No. 11-22 Response to LVFD and County. Appellant was counseled by the Board staff member that failure to comply with the Board's hearing procedures could result in the Board finding Appellant in noncompliance with its Hearing Procedures and result in the Board sanctioning Appellant by entering judgment in favor of LVFD.

On May 4, 2011, the Board ordered Appellant to provide a statement of such good cause as exists for why Appellant failed to file Appellant's Prehearing Submission in this

¹ Appellant first received a copy of the Board's Hearing Procedures when Appellant received the Board's Decision on Appellant's Stay Request, which was issued on February 3, 2011. See Decision on Appellant's Stay Request at 6 n.12. Appellant also received a copy of the Board's Hearing Procedures when Appellant received the Board's April 18, 2011 notification of the scheduling of a Prehearing Conference. See Letter from Board staff member to Appellant, dated 04/18/11, subject: MSPB Case No. 11-22.

² Appellant sent a copy of Appellant's email to various officials of the County, even though Appellant is aware that the County has been dismissed as a party in this case. See Decision on Appellant's Stay Request at 5.

³ The Board's staff member provided Appellant with yet another copy of the Board's Hearing Procedures as an attachment to the email to Appellant. See Email from Board staff member to Appellant, dated 05/03/11, subject: Re: MSPB Appeal No. 11-22 Response to LVFD and County.

case.⁴ See Show Cause Order. Appellant was informed that failure to show good cause could result in the Board entering judgment in favor of LVFD. Id.

On May 11, 2011, Appellant filed a response to the Board's Show Cause Order (Appellant's Response), indicating Appellant had not intended to impede the proceedings in this case but had somehow misinterpreted the expected flow of information.⁵ Appellant also stated that Appellant believed that the Board had decided to consolidate all of the cases tied to another Local Fire and Rescue Department (LFRD)⁶ case. Appellant's Response at 1.

Appellant also indicated that as the Board has dismissed the County as a party in this case and it appears that the proceedings in this matter will only concern whether proper notice was given by LVFD, then Appellant is not sure that there is any reason to hold a hearing. Appellant's Response at 1. Appellant stated that Appellant did receive notice. Id. Appellant further indicated that if the Board is going to reexamine the County's role in the process, then "it will pay to continue the process."⁷ Id. at 1-2.

On May 16, 2011, the Board received Appellee's Response⁸ to Appellant's Response to Show Cause Order (Appellee's Response). Appellee noted that Appellant had indicated in Appellant's response that unless the Board was willing to reexamine the County's role in the process, then it did not pay to continue the appeal process. Appellee's Response at 1. Appellee stated that the dismissal of the County by the Board has not been appealed by the

⁴ In addition to issuing the Show Cause Order, the Board once again served Appellant a copy of its Hearing Procedures. See Email from Board staff member to Appellant, dated 05/04/11, subject: FW: Show Cause Order.

⁵ The Board's Hearing Procedures make clear how the flow of information is to occur. Appellee must file its Prehearing Submission first, with a copy served on the Appellant. This Appellee did when on April 12, 2011 it filed its Prehearing Submission, which included arguments on behalf of its position, the identification of exhibits and witnesses for the Hearing, and an estimated time for presenting its case. See Appellee's Prehearing Submission. Appellant, after receipt of the Appellee's Prehearing Submission, is then required to file Appellant's Prehearing Submission by the date established by the Board.

⁶ The Board would point out to Appellant that there has been no consolidation of the various LFRD reduction-in-force appeals.

⁷ In Appellant's Response, Appellant promulgated various interrogatories that Appellant wants the Board to order LVFD to answer. Once Appellant has filed a proper Prehearing Submission, evidencing Appellant's intention to continue to prosecute Appellant's appeal, the Board will order LVFD to respond to Appellant's requests.

⁸ Appellee LVFD, by separate correspondence, indicated it had served Appellant with another copy of its Prehearing Submission. See Letter from Appellee's counsel to Appellant, dated 05/12/11, subject: Appellant v. LVFD, Case No. 11-22.

Appellant to court and, therefore, there is no good cause as to why the instant appeal should continue. Id. at 2.

As the Board made clear in its Decision on Appellant's Stay Request, the County is not a party to this proceeding; rather, Appellant's employer at the time of Appellant's termination, LVFD, is the proper party. See Decision on Appellant's Stay Request at 5. Appellant could have asked the Board to reconsider this decision, but Appellant failed to do so in a timely manner. Accordingly, the Board will not examine the role of the County in this process; rather, the issue to be decided in this case is whether Appellant's reduction-in-force action was in accordance with applicable County personnel regulations and otherwise proper.

It is unclear to the Board whether Appellant wants to abandon Appellant's appeal or pursue it. As Appellant is pro se, the Board has determined to provide Appellant one more opportunity to file Appellant's Prehearing Submission, which must adhere to the requirements found in the Board's Hearing Procedures. If Appellant wishes to proceed in this matter to a hearing, Appellant's Prehearing Submission is due by **COB May 31, 2011**. Should Appellant decide that Appellant does not want to pursue Appellant's appeal any longer, Appellant must notify the Board of this decision. Appellant is warned that failure to file Appellant's Prehearing Submission in a timely manner or Appellant's failure to have the Prehearing Submission conform to the requirements found in the Board's Hearing Procedures will result in the Board dismissing Appellant's appeal for failure to prosecute.⁹ See MSPB Case No. 09-07 (the Board dismissed the appeal based on appellant's failure to file a Prehearing Submission).

⁹ Section 35-7(b) of the Montgomery County Personnel Regulations, 2001 (as amended) provides that the Board may dismiss an appeal if the appellant fails to prosecute the appeal or comply with established appeal procedures.

ATTORNEY FEE REQUESTS

Section 33-14(c)(9) of the Montgomery County Code provides the Board with the authority to “[o]rder the county to reimburse or pay all or part of the employee’s reasonable attorney’s fees.” The Code instructs the Board to consider the following factors when determining the reasonableness of attorney fees:

- 1) Time and labor required;
- 2) The novelty and complexity of the case;
- 3) The skill requisite to perform the legal services properly;
- 4) The preclusion of other employment by the attorney due to the acceptance of the case;
- 5) The customary fee;
- 6) Whether the fee is fixed or contingent;
- 7) Time limitations imposed by the client or the circumstances;
- 8) The experience, reputation and ability of the attorneys; and
- 9) Awards in similar cases.

Section 33-15(c) of the Montgomery County Code requires that when the Chief Administrative Officer (CAO) seeks judicial review of a Board order or decision in favor of a merit system employee, the County is responsible for the employee’s legal expenses, including attorney fees, which result from the judicial review. The County is responsible for determining what is reasonable, using the criteria set forth above.

In Montgomery County v. Jamsa, 153 Md. App. 346 (2003), the Maryland Court of Special Appeals concluded that the Montgomery County Code grants the Board discretion to award attorney’s fees to an employee who seeks judicial review of a Board order or decision if the employee prevails on appeal.

If an appellant prevails in a case before the Board, the Board will provide the appellant with the opportunity to submit a request for attorney fees. After the appellant submits a request, the County is provided the chance to respond. The Board then issues a decision based on the written record.

The following cases involve a request for attorney fees that were decided during fiscal year 2011.

ATTORNEY FEE DECISIONS

CASE NO. 10-19

DECISION ON ATTORNEY FEE REQUEST

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on the request of Appellant for reimbursement of itemized attorney fees and costs related to the above-referenced case. Appellant has submitted a request for attorney fees and costs in the amount of \$6,739.27. See Petition for Attorney's Fees (Fee Petition) at 7. The County responded (County's Response), indicating it objects to the payment of any fees and costs beyond the flat fee of \$5,000.00 agreed to by Appellant and Appellant's counsel. The County also suggests that the Board may reduce the flat fee below the amount agreed to by Appellant and Appellant's counsel, based upon consideration of the other factors outlined in the County Code provisions governing the award of attorney fees. According to the County, the Board should reduce the flat fee by at least \$2,000.00.

THE PARTIES' POSITIONS ON THE AMOUNT OF ATTORNEY FEES IN THE INSTANT CASE

Appellant acknowledges entering into a flat fee arrangement with Appellant's counsel to represent Appellant in this matter at the flat fee of \$5,000.00. Fee Petition at 4. Appellant's counsel states that Appellant's counsel "investigated the likely needs of this kind of litigation and determined that a flat fee was appropriate under the circumstances."¹ Fee Petition at 4. Counsel notes that Appellant had no money to pay the fee at the time the fee agreement was entered into and there have been discussions that counsel would accept an assignment of benefits from Appellant's ongoing workers' compensation matter. Id. at 5. However, as of the date of the filing of the petition for fees, Appellant's counsel has received no payment for Appellant's counsel's services. Id. At the request of the County, Appellant's counsel has submitted the Retainer Agreement in this matter, as well as an unredacted copy of Appellant's counsel's billing invoice to Appellant.

The County, in its Response, objects to Appellant's counsel's hourly rate, arguing that Appellant's counsel is "a relatively inexperienced attorney." County's Response at 3. The County acknowledges that the Board has, in other attorneys' fee award decisions, looked to the Local Maryland Rules for guidance and that, pursuant to the Maryland Rules, the hourly rate for attorneys, such as Appellant's counsel, admitted to the bar for five to eight years is \$165.00-\$250.00. Nevertheless, the County argues that, as Appellant's counsel litigated before the Board, a quasi-judicial agency, and not the U.S. District Court, the Board

¹ Appellant's counsel notes that at the time Appellant's counsel was retained, Appellant's counsel was billing clients at the rate of \$200.00 per hour. Therefore, the flat fee agreed to with Appellant results in an award of fees to counsel of an amount over \$600.00 less than had they negotiated a contingency fee. Fee Petition at 4.

should not consider the case to be equivalent to a court case governed by the Maryland Rules.

APPROPRIATE REIMBURSEMENT FORMULA

Montgomery County Code, Section 33-14, *Hearing Authority of the Board*, in providing the Board with remedial authority, empowers the Board in subsection (c) to “[o]rder the County to reimburse or pay all or part of the employee’s reasonable attorney’s fees” (emphasis added). See also Montgomery County, Maryland v. Jamsa, 153 Md. App. 346, 355, 836 A.2d 745, 750 (Ct. Spec. App. 2003) (the court, in discussing Section 33-14(c)(9), which authorizes the Board to pay “all or part” of an employee’s reasonable attorney’s fees, noted that “[t]he County Council did not mandate that the Board award attorney’s fees; it authorized the Board to do so.”).

In determining what constitutes a reasonable fee, the Code instructs that the Board consider the following factors:

- a. Time and labor required;
- b. The novelty and complexity of the case;
- c. The skill requisite to perform the legal service properly;
- d. The preclusion of other employment by the attorney due to the acceptance of the case;
- e. The customary fee;
- f. Whether the fee is fixed or contingent;
- g. Time limitations imposed by the client or the circumstances;
- h. The experience, reputation and ability of the attorneys; and
- i. Awards in similar cases.

Montgomery County Code § 33-14(c)(9). After consideration of the foregoing factors, the Board’s findings are set forth below.

Appropriate Hourly Rates For Appellant’s Counsel

The Board notes at the outset that one of the Code’s factors is whether the attorney fee is fixed or contingent. Appellant’s counsel has submitted the Retainer Agreement between Appellant and counsel for this case. The Retainer Agreement indicates that Appellant was required to reimburse Appellant’s counsel and Appellant’s counsel’s Law Firm at the flat rate of \$5,000.00 for services performed by Appellant’s counsel through the trial in this matter. See Flat Fee Retainer Agreement at 1.

Appellant’s counsel indicates that at the time Appellant’s counsel was retained by Appellant, Appellant’s counsel was billing clients at the rate of \$200.00 per hour and that

Appellant's counsel billing rate increased from \$200.00 to \$225.00² in July 2010. Fee Petition at 4. Appellant's counsel indicates Appellant's counsel was licensed to practice law in Maryland in December 2004 and has been in private practice since being licensed. Fee Petition at 5-6. Appellant's counsel indicates that Appellant's counsel handled complex civil litigation and, since beginning Appellant's counsel's employment with Appellant's counsel's current firm, has handled over one hundred cases. *Id.* at 6. The Board has considered the nature and complexity of the instant case, the experience of counsel, the tasks necessary in presenting the case, and the customary fees charged in these type cases,³ as well as the Retainer Agreement between Appellant and Appellant's counsel, and finds that \$200.00 an hour for Appellant's counsel's services is reasonable under the Code's factors.

However, because Appellant entered into a flat fee agreement with Appellant's counsel, Appellant was obligated to pay that amount, no matter how much or how little time was expended. The Board notes that 24.90 hours were expended by Appellant's counsel representing Appellant through the hearing in this matter. At \$200.00 an hour, the cost of representation comes to \$4,980.00. Subsequent to the hearing, Appellant's counsel indicated that Appellant's counsel expended another 6.90 hours.⁴ Thus, the Board finds that the \$5,000.00 flat fee arrangement is fair compensation for the litigation of Appellant's appeal.

² Even though Appellant's counsel's hourly rate increased to \$225.00 in July 2010, Appellant's counsel's Billing Invoice reflects that Appellant's counsel only charged Appellant at the rate of \$200.00 per hour after July 2010.

³ In particular, the Board has followed its practice of considering the guidelines in the Local Maryland Rules for determining an appropriate hourly rate. *See* MSPB Case No. 07-17 (2008); MSPB Case No. 06-03 (2010). The Board notes that the County's argument that it should not follow the Local Maryland Rules is completely contrary to the position taken by the same County attorney in MSPB Case No. 07-17, wherein the attorney argued that the Local Maryland Rules, while not binding on the Board, were relevant. *See* MSPB Case No. 07-17 at 4. As acknowledged by the County, under the Local Maryland Rules, a rate of \$165.00-\$250.00 an hour is appropriate for someone with Appellant's counsel's experience.

⁴ Appellant's counsel's Billing Invoice indicates Appellant's counsel expended 2.60 hours on discussions with Appellant's counsel's client about potential relief and the drafting of a letter to the Board on the subject of appropriate relief. Billing Invoice at 2-3. At the hearing in this case, the Board indicated after the County rested its case that it was going to rule in favor of the Appellant. Hearing Transcript at 112-13. Both the County's counsel and Appellant's counsel then asked to address the issue of remedies. *Id.* at 113. The Board rejected receiving any briefing from the parties on the issue of remedy, indicating that it would decide the issue in its written opinion. *Id.* at 113-14. Thus, when the Board received Appellant's counsel's letter, as well as the County's objection to the filing of the letter, the Board responded that it would not consider the letter, as it had been quite clear at the hearing that it did not need to hear anything regarding the issue of the appropriate remedy. *See* Email from Board staff member to Appellant's counsel and the Assistant County Attorney, dated 09/30/10, subject: Appellant's Appeal Case No. 10-19.

Fees

Appellant's counsel has submitted a request for \$379.27 in costs and has provided information regarding them. The County, while not specifically opposing the amount of costs, argues that Appellant should be governed by the fixed fee arrangement. County's Response at 1. The Board has reviewed the billing statement and finds these costs are reasonable, and will order reimbursement for them.

ORDER

Based on the foregoing, the Board concludes the following:

1. The County is ordered to reimburse attorney fees in the amount of \$5,000.00 for Appellant's counsel's representation of Appellant through the hearing of this matter; and
2. The County shall reimburse Appellant \$379.27 in costs.

CASE NO. 11-03

CASE NO. 11-04

DECISION ON ATTORNEY FEE REQUEST

This is the Final Decision of the Montgomery County Merit System Protection Board (Board) on the request of Appellant A and Appellant B, on behalf of Appellant B's minor children¹ (Appellants), for reimbursement of itemized attorney fees and costs related to the above-referenced cases.² Appellants have submitted a request for attorney fees and costs in the amount of \$12,522.15, with \$12,352.00 attributable to fees and \$170.15 attributable to costs. See Petition for Recovery of Attorneys' Fees and Expenses (Fee Petition) at 7. The County responded (County's Response), objecting to duplicative billing for the cases, excessive hours billed, hours billed for work not associated with the cases, and the hourly rates being requested for both attorneys who worked on the cases.³ The County asserts that the Board should award \$4,120.00 in attorney fees. The County has taken no position on the \$170.15 in costs sought by Appellants.

¹ Appellant B's minor children are child A and child B.

² Although there were two separate appeals to the Board, one from Appellant A and the other from Appellant B, on behalf of Appellants' minor children, Appellants' counsel filed one response on behalf of both Appellants.

³ Ms. C and Mr. D are Appellants' counsel. Fee Petition, Ex. A, Declaration of Ms. C at 3, 4.

THE PARTIES' POSITIONS ON THE AMOUNT OF ATTORNEY FEES IN THE INSTANT CASE

Appellants seek reimbursement for their counsel at the *Laffey* rates⁴ as they are the well-established customary rates for attorneys located in Washington, D.C., such as Appellants' counsel. Fee Petition at 6. Appellants note that the Federal Labor Relations Authority has used the *Laffey* rates for awards of attorneys' fees. *Id.* at 7. Pursuant to the *Laffey* matrix, Appellants' counsel, who has seventeen years of litigation experience, would be entitled to a rate of \$420.00, while Mr. D, who has practiced with the firm since January 2010, would be entitled to a rate of \$230.00. Fee Petition, Ex. A, Ex. 1 at 2, Ex. 2.

The County notes that the Board has previously ruled that the *Laffey* rates claimed by Appellant's attorneys have "no controlling precedence over the Board." County's Response at 6 (quoting MSPB Case No. 04-01 (2005) at 2-3 and MSPB Case No. 07-17 (2008) at 8). The County also notes that the Montgomery County Circuit Court has rejected the use of the *Laffey* matrix. County's Response at 6 (citing to *Mathena v. MSPB, et al.*, No. 263758V (Cir. Ct. for Montgomery County, MD, Apr. 18, 2006)).

The County argues that if the Board should wish to look for guidelines as to reasonable attorney fees, the Rules and Guidelines for Determining Attorneys' Fees in Certain Cases issued by the United States District Court for the District of Maryland (Maryland Local Rules), are more relevant.⁵ The County notes that the Board has previously looked to these rules. County's Response at 7 (citing to MSPB Case No. 07-17). Pursuant to the Maryland Local Rules, the County asserts that Ms. C should be awarded a rate of \$275.00 an hour and Mr. D should be awarded a rate of \$150.00. County's Response at 7.

The County also objects to duplicative billing for the same work by Ms. C and Mr. D, and objects to charges not associated with Appellants' counsel responding to the County's pleadings in this matter. County's Response at 2-3, 5. The County also asserts that counsel spent excessive time on this matter, noting that Mr. D, a junior level attorney, billed excessive time on the research and preparation of the response memorandum, and Ms. C spent an excessive amount of time in preparing the fee petition. *Id.* at 4, 6. Overall, the County seeks a reduction in the amount of hours billed by Ms. C from 17.80 to 10.40 and a

⁴ The *Laffey* rates claimed by Appellants' attorneys are actually found in a matrix of hourly rates for attorneys of varying experience levels prepared by the Civil Division of the United States Attorney's Office for the District of Columbia. *See* Fee Petition, Ex. A, Ex. 2. The matrix is based on the hourly rates for attorneys allowed by the Federal District Court of the District of Columbia in *Laffey v. Northwest Airlines*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985). *Id.* The matrix's rates for subsequent years are determined by adding the cost of living for the Washington, D.C. area to the applicable rate for the prior year. *Id.*

⁵ The Maryland Local Rules are available at <http://www.mdd.uscourts.gov/localrules/localrules.html>.

reduction in the amount of hours billed by Mr. D from 21.20⁶ to 8.40. County's Response at 8.

APPROPRIATE REIMBURSEMENT FORMULA

Montgomery County Code, Section 33-14, *Hearing Authority of the Board*, in providing the Board with remedial authority, empowers the Board in subsection (c) to “[o]rder the County to reimburse or pay all or part of the employee’s reasonable attorney’s fees” (emphasis added). See also *Montgomery County, Maryland v. Jamsa*, 153 Md. App. 346, 355, 836 A.2d 745, 750 (Ct. Spec. App. 2003) (the court, in discussing Section 33-14(c)(9), which authorizes the Board to pay “all or part” of an employee’s reasonable attorney’s fees, noted that “[t]he County Council did not mandate that the Board award attorney’s fees; it authorized the Board to do so.”).

In determining what constitutes a reasonable fee, the Code instructs that the Board consider the following factors:

- a. Time and labor required;
- b. The novelty and complexity of the case;
- c. The skill requisite to perform the legal service properly;
- d. The preclusion of other employment by the attorney due to the acceptance of the case;
- e. The customary fee;
- f. Whether the fee is fixed or contingent;
- g. Time limitations imposed by the client or the circumstances;
- h. The experience, reputation and ability of the attorneys; and
- i. Awards in similar cases.

Montgomery County Code § 33-14(c)(9). After consideration of the foregoing factors, the Board’s findings are set forth below.

A. Appropriate Hourly Rates For Ms. C And Mr. D

As the County correctly notes, it is well established that the Board has repeatedly rejected, with the Circuit Court’s approval, the use of the *Laffey* matrix for determining an appropriate hourly rate. County’s Response at 6 (citing to MSPB Case Nos. 04-14 and 07-17). Rather, the Board looks to the Maryland Local Rules for guidance with regard to what a relevant hourly rate would be for various attorneys who had represented the appellants in this matter. See MSPB Case Nos. 06-03 (2010); 07-17 (2008).

⁶ The Board notes that there is an error on the calculation of Mr. D’s hours. While the Summary of Attorneys’ Fees provided by Appellants indicates that Mr. D worked a total of 21.20 hours, see Fee Petition, Ex. A, Ex. 1 at 2, the itemized listing of hours worked by Mr. D only totals 21.10 hours. See Fee Petition, Ex. A, Ex. 1 at 3.

Ms. C indicates she has seventeen years of civil litigation experience. Fee Petition, Ex. A at 1. The Board has considered the nature and complexity of the instant case, the experience of counsel, the tasks necessary in presenting the case, and the customary fees charged in these type cases,⁷ and finds that \$275.00 an hour for Ms. C's services is reasonable under the Code's factors.

Mr. D has practiced law at Law Firm X since January 2010. Fee Petition, Ex. A at 4. The Board has considered the nature and complexity of the instant case, the experience of counsel, the tasks necessary in presenting the case, and the customary fees charged in these type cases,⁸ and finds that \$150.00 an hour for Mr. D's services is reasonable under the Code's factors.

B. The Amount Of Time Billed

Because of the multitude of arguments made by the County with regard to the amount of hours billed by both Ms. C and Mr. D, the Board will review each entry for each attorney the County has challenged separately.

1. The Amount of Time Billed for Ms. C's Services

The first entry by Ms. C is for 9/13/10 in the amount of 1.20 hours. The entry indicates the following: "Review file; follow up with Client and with workers comp counsel Berman about status and strategy; follow up with Local about same." Fee Petition, Ex. A, Ex. 1 at 4. The County seeks to decrease the amount by .50 hours, arguing that Local 1664,⁹ which represents the firefighters of Montgomery County, is not a party to this case and therefore it is inappropriate to bill the County for counsels' contact with the Local. County's Response at 2. The Board agrees. As the County notes, the phone calls and contact with the Local are not itemized individually; therefore, the County estimates that each phone call lasted a half hour and asks that this entry be reduced accordingly. We agree and so will reduce Ms. C's time for this entry to .70 hours.

The next entry by Ms. C is for 10/05/10 in the amount of .30 hours. The entry indicates the following: "Email correspondence to County Attorney's office about stay." Fee Petition, Ex. A, Ex. 1 at 4. The County seeks to subtract the entire amount of this entry. County's Response at 3-4. As there was never any stay at issue in this case, we agree with the County and will deduct .30 hours from Ms. C's time.

⁷ Pursuant to the Local Maryland Rules, a rate of \$275.00-\$400.00 an hour is appropriate for someone with Ms. C's experience. Local Maryland Rules at 90.

⁸ Pursuant to the Local Maryland Rules, a rate of \$150.00-\$190.00 an hour is appropriate for someone with Mr. D's experience. Local Maryland Rules at 90.

⁹ In their Fee Petition, Appellants' counsel noted that they had an ongoing relationship with IAFF Local 1664. Fee Petition at 8.

The next entry the County seeks to reduce is for 10/25/10 in the amount of 1.40 hours. County's Response at 2. The entry indicates the following: "Review and edit letter brief and correspondence to Local 1664 about same." Fee Petition, Ex. A, Ex. 1 at 4. The County notes that Local 1664 is not a party to the case. County's Response at 2. As the time spent on the Local 1664 correspondence is not individually itemized, the County again seeks to reduce this entry by .50 hours. County's Response at 2. We agree and will reduce Ms. C's time for this entry to .90 hours.

The County seeks to subtract the entire time of the entry for 10/26/10, as the entry indicates: "Phone conference with Local 1664 about strategy." County's Response at 2; Fee Petition, Ex. A, Ex. 1 at 4. As Local 1664 is not a party to this case, we agree and will subtract the entire .20 hours billed from Ms. C's time.

The County also seeks to subtract the entire time for the entry for 10/28/10. County's Response at 3-4. The entry for this date indicates: "Office conference about Appellants question about motion to stay." Fee Petition, Ex. A, Ex. 1 at 4. As no motion for a stay was ever part of the instant case, the Board agrees with the County and will subtract the .20 hours billed for this entry.

The County seeks to subtract the entire entry for 11/02/10 on the grounds that this work occurred after Appellants filed their response with the MSPB and, therefore, is unrelated to this appeal. County's Response at 2. The entry indicates: "Phone conference with Appellant A; review and discuss retirement issues." Fee Petition, Ex. A, Ex. 1 at 4. The Board agrees with the County's logic and will subtract the .60 hours billed for this entry.

The County argues that the entire entry for 11/05/10 should be subtracted as this work occurred after Appellants filed their response with the MSPB and, therefore, is unrelated to the appeal. County's Response at 3. This entry indicates: "Phone conference with Appellant A about MSPB appeal." Fee Petition, Ex. A, Ex. 1 at 4. We agree with the County and will subtract the .50 hours billed for this entry.

The County next seeks the subtraction of the entire entry for 11/08/10. County's Response at 3. The entry for this date indicates: "Prepare conflict of interest waiver form for Appellants." Fee Petition, Ex. A, Ex. 1 at 4. In support of its argument to deduct this charge, the County notes that this charge occurred after Appellants filed their response with the MSPB. County's Response at 3. The Board also notes that a conflict of interest waiver was never an issue in this case. Accordingly, the Board will subtract the entire .30 hours billed for this date.

The County seeks to deduct the entire entry for 11/09/10. County's Response at 2. This entry indicates: "Respond to Appellant A's questions about death benefits." Fee Petition, Ex. A, Ex. 1 at 4. The County notes that there was no issue raised in the appeal regarding the amount of benefit payments. County's Response at 2. The Board agrees and will deduct the entire entry for this date of .30 hours.

The County also seeks to subtract the entire entry for 11/29/10, which states: “Phone conference with Appellant A’s attorney about conflict waiver.” County’s Response at 3; Fee Petition, Ex. A, Ex. 1 at 4. As noted above, a conflict of interest waiver was never an issue in this case and so the Board will deduct the entire .20 hours billed on this date.

The County seeks to have the entire amount of time billed for 12/02/10 deducted. County’s Response at 5. The entry for this date indicates: “Review and analyze decisions; phone conference with Local 1664 about same; phone conference with Appellant A about same; research MSPB circuit court appeals; follow up correspondence with Appellant A.” Fee Petition, Ex. A, Ex. 1 at 5. The County argues that Ms. C billed time for work on an issue after the MSPB released its Final Decision, but the issue – an appeal of the Board’s Final Decision – had not arisen in connection with the case. County’s Response at 5. The County also points out that part of the entry deals with a call to Local 1664. *Id.* The Board notes that the entry prior to this on 12/01/10 indicates that there was a phone conference about the Board’s decisions. The Board also finds that on 12/03/10, Ms. C billed for a phone conference with Appellants about the decisions and for preparation of correspondence to the Appellants about the decisions. Fee Petition, Ex. A, Ex. 1 at 5. Thus, it would appear that the phone conference and correspondence to Appellant A billed for on 12/02/10 is duplicative to the phone conference and correspondence billed on 12/03/10. The Board agrees with the County that the time spent on the phone call with Local 1664 must also be subtracted, as Local 1664 was not a party to this case. Finally, the Board agrees with the County that, as Appellants had won before the Board, there was no need to research MSPB circuit court appeals. Accordingly, because the work reflected in the 12/02/10 entry is in part duplicative in nature to that billed on 12/01/10 and 12/03/10, deals with contact with a nonparty and work on a matter not at issue in this case, the Board finds it is appropriate to delete the entire 1.80 hours billed for this date.

Finally, the County argues that Ms. C billed an excessive amount of time for preparation of the fee petition. County’s Response at 6. Specifically, Ms. C billed 1.50 hours on 12/03/10 (which included time for a phone conference with the Appellants and correspondence to the Appellants) and 3.50 hours on 12/06/10. Fee Petition, Ex. A, Ex. 1 at 5. In support of its argument for reduction, the County notes that Ms. C’s office often files fee petitions so that it should not have taken so long for her to prepare the one in this case. County’s Response at 6; *see also* Fee Petition at 9. The Board agrees that the time spent appears to be excessive and, therefore, will reduce the amount billed on 12/06/10 by 2.00 hours to a total of 1.50 hours.

Thus, based on the foregoing analysis, the Board will reduce the amount of hours billed by Ms. C from 17.80 to 10.40. Based on an hourly rate of \$275.00, Appellants will be awarded \$2,860.00 for Ms. C’s services.

2. The Amount of Time Billed for Mr. D’s Services

The first entry for Mr. D is for 10/21/10 for .60 hours. The entry indicates: “Office conference to discuss appeal of MSPB.” Fee Petition, Ex. A, Ex. 1 at 3. The County notes that Ms. C had a similar entry, albeit only for .40 hours on 10/21, which stated: “Office

conference about brief and next steps.” County’s Response at 5; Fee Petition, Ex. A, Ex. 1 at 3. The County seeks a reduction for duplicative services. County’s Response at 5. Under the Local Maryland Rules,

[g]enerally, only one lawyer is to be compensated for client, third party and intra-office conferences, although if only one lawyer is being compensated the time may be charged at the rate of the more senior lawyer. Compensation may be paid for attendance of more than one lawyer where justified for specific purposes such as periodic conferences of defined duration held for the purpose of work organization, strategy, and delegation of tasks in cases where such conferences are reasonably necessary for the proper management of the litigation.

Local Maryland Rules at 89 available at
<http://www.mdd.uscourts.gov/localrules/localrules.html>.

As it appears to the Board that this entry was the first time Mr. D was involved in this case, the Board will allow time for this office conference as it would appear to be for the purpose of delegating tasks to Mr. D to perform. However, the Board will reduce the amount billed from .60 hours to .40 hours to mirror the time Ms. C billed for the same task.

The County argues that Mr. D, as a junior attorney, billed excessive time on the research and preparation of Appellants’ response to the MSPB. County’s Response at 4. Specifically, Mr. D billed 4.00 hours on 10/22/10, 7.40 hours on 10/25/10, 1.80 hours on 10/26/10, and 3.00 hours on 10/27/10. Id. at 4-5; Fee Petition, Ex. A, Ex. 1 at 3. The County seeks a reduction of 8.50 hours for these dates: 1.00 hour on 10/22/10; 6.00 hours on 10/25/10 and 1.50 hours on 10/27/10. County’s Response, Attachment 1¹⁰ at 4. Having reviewed the pleadings in this matter, the Board agrees that the time and labor needed to accomplish the tasks required in this case was far less than that billed by Mr. D. Accordingly, the Board will grant the County’s request to reduce Mr. D’s time by 8.50 hours for these dates.

The County seeks a reduction of .50 hours for the phone conference on 10/26/10 with Union President X,¹¹ as Union President X was not a party to this matter. County’s Response at 2. However, as the phone conference only lasted .20 hours, according to Ms. C’s entry for this date, see Fee Petition, Ex. A, Ex. 1 at 4, the Board will subtract .20 hours instead of the .50 hours sought by the County.

¹⁰ Once again, despite the Board’s admonishment about the need to label attachments, the County failed to label its attachment to the County’s Response, which was a copy of the Summary of Attorneys’ Fees submitted by Appellants with handwritten revisions. For ease of reference, the Board has labeled it Attachment 1.

¹¹ The Board notes that Mr. X is President of Local 1664, Montgomery County Career Fire Fighters Association of the International Association of Fire Fighters.

The County seeks the elimination of the entire time billed by Mr. D on 11/01/10. County's Response at 3. The entry for this date indicates: "Phone conference with Appellant A regarding reasons for not requesting stay in MSPB appeal; review documents regarding calculations." Fee Petition, Ex. A, Ex. 1 at 3. In support of its position, the County argues that the work done on this date had nothing to do with the appeal pending before the Board, as it was done after the Appellants had filed their response with the Board and there was no issue raised regarding the amount of benefit payments. County's Response at 2-3. The Board agrees and will reduce Mr. D's time by 1.30 hours billed on this date.

The County also argues that the entire time billed on 11/02/10 should be eliminated for the same reason. County's Response at 3. The entry for that date indicates: "Phone conference with Appellant A regarding benefit calculations; review county ordinances." Fee Petition, Ex. A, Ex. 1 at 3. The Board agrees with the County's position and will reduce Mr. D's time by .90 hours.

The County argues that the entire time billed on 11/05/10 should be subtracted. County's Response at 3. The entry for this date states: "Phone conference regarding MSPB appeal; draft conflict waiver for Appellant A; phone conference with Appellant B regarding appeal." Fee Petition, Ex. A, Ex. 1 at 3. The County asserts that this work was unrelated to the appeal, as it occurred after Appellants filed their response. The Board agrees and will reduce Mr. D's time by 1.40 hours billed for this date.

The County seeks to eliminate the time spent on 11/08/10 by Mr. D. County's Response at 3. The entry for this date indicates: "Review email regarding Appellant A's conflict waiver." Fee Petition, Ex. A, Ex. 1 at 3. The County argues that the work done was unrelated to the appeal. County's Response at 3. The Board agrees and will reduce Mr. D's time by .10 hours.

The County argues that Mr. D's time on 11/10/10 should also be deducted. The entry for this date indicates: "Review emails regarding death benefits calculations." Fee Petition, Ex. A, Ex. 1 at 3. The County asserts that there was no issue regarding the amount of benefit payments. The Board agrees with the County and will deduct the .10 hours of time billed.

The Board notes that Mr. D billed .10 hours on 11/11/10. Specifically, the entry for this date indicates: "Update information in case." Fee Petition, Ex. A, Ex. 1 at 3. This work took place after the Appellants submitted their response but before the Board issued its Final Decision. The Board is at a loss to understand what needed to be updated as there was no activity in the case at this time. Accordingly, the Board will reduce Mr. D's time by .10 hours.

Finally, the Board notes that on 12/06/10, Mr. D billed .20 hours. The entry for this date indicates: "Review file regarding documentation of Mr. X's three children." Fee Petition, Ex. A, Ex. 1 at 3. This appears to be work done in connection with the unsuccessful

Motion for Reconsideration that was filed by counsel on behalf of Appellant A¹² on December 8, 2010. Accordingly, the Board has determined to disallow this charge and will reduce Mr. D's time by .20 hours.

Thus, based on the foregoing analysis, the Board will reduce the amount of hours billed by Mr. D from 21.10 to 8.10. Based on an hourly rate of \$150.00, Appellants will be awarded \$1,215.00 in fees for Mr. D's services.

C. Fees Requested

Appellants' counsel has submitted a request for \$170.15 in costs and has provided information regarding them. Fee Petition, Ex. A, Ex. 3. The County has not opposed the fees sought. The Board has reviewed the billing statement, and finds these costs are reasonable and will order reimbursement for them.

ORDER

Based on the foregoing, the Board concludes the following:

1. The County is ordered to reimburse Appellants attorney fees in the amount of \$4,075.00 for representation by Ms. C and Mr. D in this matter; and
2. The County shall reimburse Appellants \$170.15 in costs.

¹² Specifically, the Motion sought to have the Board amend its Final Decision to state that Mr. X was survived by three minor children. In their Fee Petition, Appellants' counsel asserted that no fees or expenses were being sought for any work in connection with the Motion for Reconsideration. Fee Petition at 2 n.1. However, the issue of how many children Mr. X had was only raised with the Board when Appellant A filed Appellant A's Motion for Reconsideration of the Board's Final Decision on December 8, 2010.

OVERSIGHT

Pursuant to statute, the Board performs certain oversight functions. Section 33-11 of the Montgomery County Code provides in applicable part that

[t]he Board must have a reasonable opportunity to review and comment on any proposed new classes except new classes proposed for the Management Leadership Service

Based on the above-referenced provision of the Code, Section 9-3(b)(3) of the Montgomery County Personnel Regulations, 2001 (as amended October 22, 2002, April 27, 2004, July 12, 2005, June 27, 2006, December 11, 2007, and October 21, 2008) provides that the Office of Human Resources Director shall notify the Board of a proposed new class and give the Board a reasonable opportunity to review and comment before creating the class.

In fulfilling this mandate during FY11, the Board reviewed and, where appropriate, provided comments on the following new class creations:

- 1) Audiovisual Production Specialist, Grade 23;
- 2) Background Screening Specialist, Grade 21;
- 3) Senior Investment Portfolio Manager, Grade 34;
- 4) Senior Forensic Scientist, Grade 26;
- 5) Insurance Risk Analyst, Grade 24;
- 6) Bus Operator Instructor, Grade 19; and
- 7) Crime Analyst, Grade 20.